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Report of

The Ontario Residential Condominium Study Group





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The Ontario Residential Condominium Study Group



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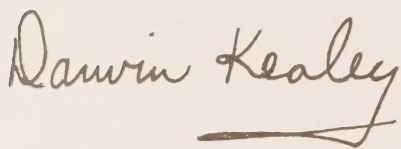
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The Honourable Larry Grossman
Minister of Consumer and Commercial Relations
Queen's Park, Ontario

Dear Mr. Grossman:

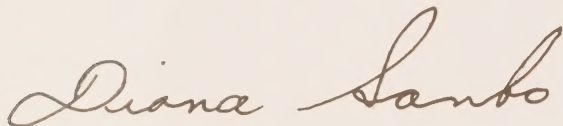
We, the members of the Ontario Residential Condominium Study Group, appointed to investigate and make recommendations with respect to residential condominiums in Ontario, are pleased to submit our report.



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Acknowledgement

The Study Group could not have completed its task without the co-operation and contribution of condominium owners and boards of directors, of developers, of municipal representatives, of management firms and all other individuals and groups concerned with the state of condominiums in Ontario. We are particularly grateful to all those who presented submissions at our hearings.

On several occasions we asked those who made submissions to provide us with additional material or to expand on their comments. We want to acknowledge their special efforts on our behalf.

We especially appreciate the assistance of Edward Furlong, C.A.

We also wish to recognize those provincial employees in the Ministry of Housing, the Ministry of Consumer and Commercial Relations and in the regional offices of the Ministry of Revenue and the Ministry of Treasury, Economics and Intergovernmental Affairs who gathered data for our research. All too often lack of data inhibits the work of an investigating group and in our case the data inevitably had to be extracted from administrative records not intended as research documents.

We are especially indebted to Brad McLelland for legal research and to Mrs. Helen Vecchiola for her unstinting efforts in providing the Study Group with efficient administrative services.

Introduction to the report

Condominium: is the future already here?

Home ownership in Ontario is undergoing a basic change. The traditional single-family house and lot is losing its predominance. There are several factors producing this change. Families are having fewer children; more single people have money to spend; and increased longevity has resulted in parents, whose children have moved away from home, remaining in the housing market. These factors have decreased the demand for suburban child-oriented dwellings and increased the demand for housing in urban settings, close to urban amenities. There is also an increase in the desire for leisure activity and the freedom from the burden of maintenance responsibility. Perhaps most important, economic forces are putting the price of single-family dwellings rapidly beyond the reach of a large segment of the population.

In response to such social and economic forces, more and more new housing has been built in developments or buildings involving the shared use or ownership of certain property where savings in the cost of land or the cost of recreational facilities can be achieved. Condominiums represent the most significant form of such an alternate method of housing people.

The condominium concept of property ownership is a relatively new one in Ontario. The major difference between condominium ownership and ownership of a single-family dwelling is that condominium owners, in addition to holding title to a particular unit within the development, also have a share of common property. For example, where a single-family house dweller owns his house and the municipality owns the parks and sewers, the condominium unit owner owns his unit and also shares ownership of the recreational and utility facilities with other owners. Closely tied to this concept of joint ownership and joint responsibility is the presence of an administrative framework, through a condominium corporation, enabling the unit owners to manage the property.

Condominium property can resemble rental accommodation, in that both may be high-density forms of housing. The similarity ends there. Misunderstanding on the part of the buying public frequently arises from the misconception that buying a condominium is basically like renting an apartment. The effect of such an attitude is that some owners show little responsibility for the appearance of the property and fail to cooperate with their neighbours. Unlike renting, condominium ownership requires shared responsibilities and offers the potential for building of the equity attendant with owning any real property.

Community life is an integral part of condominium living. Since the condominium concept is based on common property ownership, it involves owners in the problems as well as the rewards inherent in community life. This point cannot be over-emphasized, for many of the disappointments of condominium owners stem from a fundamental lack of understanding of this concept. In other words, those who do not want the responsibilities associated with community living should think very carefully before purchasing a condominium.

The condominium concept itself is not a new one. Similar forms of property ownership existed in Babylon and Rome before the birth of Christ. Fifty years ago in Brazil, a law was passed permitting the selling of condominiums, known there as "horizontal property", with similar laws being passed in the 1950's in Venezuela and Puerto Rico. Several European countries also have long experience in dealing with condominiums. It was not until the mid 1960's that condominiums came on the scene in Canada, with 1967 marking the year that Ontario's first condominium was registered. Some developers predict that by the year 2000, as many as half of all people in Ontario living in non-rental dwellings will be living in condominiums.

In Ontario, the concept has grown in popularity since the first condominium corporation was registered. Today, there are approximately 1,000 registered condominium corporations in Ontario, or some 100,000 units in existence. Ontario has the largest number of condominiums in Canada and has among the most of any North American jurisdiction. British Columbia and Alberta are the provinces with the next highest number of registered condominiums in Canada.

The pros and cons

There are many advantages of condominium ownership for those attracted to the lifestyle it offers. Perhaps the most important benefit is that condominium housing is generally less expensive than single-family housing because municipalities have permitted densities and the consequent efficient use of high cost land that they would otherwise only permit rental projects. This economic advantage also allows individuals the opportunity of enjoying recreational amenities that they might not normally be able to afford or have easy access to as owners of single-family dwellings.

The rapid growth of this form of housing, not surprisingly, has given rise to numerous problems and misunderstandings. These problems relate to a number of areas, including questionable sales techniques, unrealistically low estimates of upkeep costs, unnecessarily complex legal documents, deficiencies in municipal service, poor quality construction, lack of knowledge on the part of some lawyers and real estate agents, prolonged renting periods, delays in granting development approval, contracts that are not in the best interest of future owners, difficulties in condominium corporations assuming management responsibilities, and widespread owner apathy.

Much of the present difficulty lies in the fact that Ontario's condominium legislation was originally designed, not as a consumer protection statute, but as a method of property registration. Legislation has proven inadequate in the condominium field. To help overcome the obstacles that are currently preventing the full potential of condominiums from being realized, the Honourable Sidney Handleman, then Minister of Consumer and Commercial Relations, established the Ontario Residential Condominium Study Group in November 1976.

Terms of reference

The Ontario Residential Condominium Study Group was established to examine all aspects of condominium home ownership, to identify the main problem areas, to suggest feasible alternate courses of action to help solve the problems, and to make recommendations to the provincial government for changes in existing legislation, industry practices and consumer awareness. As indicated in its name, the Study Group was charged with examining only residential, not commercial or industrial, condominiums.

Methodology

The Study Group held eleven public hearings in nine cities in Ontario and received briefs from all interested groups and individuals who wished to make oral or written submissions. A separate hearing was held for special interest groups who had lengthier and more technical briefs to present. To complete public participation, the Study Group sponsored the Ontario Condominium Conference 1977, the first province-wide conference for condominium corporations, management firms, lenders, developers and associations. To promote attendance, all public hearings were heavily publicized and thousands of direct letters of invitation to submit briefs were distributed. Associations representing condominium corporations were especially effective in spreading the word among their members.

Approximately 280 briefs were received by the Study Group, of which 234 were written submissions. These briefs represented the views of every conceivable group of people involved in condominiums, including condominium corporations, purchasers in unregistered projects, owners living in conversion dwellings, lending institutions, insurance firms, the legal profession, property management companies, developers, construction companies, architects, real estate agents, professional engineers, and federal, provincial and municipal government representatives.

The hearings were held in the following locations:	
Thunder Bay	- December 15, 1976
Windsor	- January 12, 1977
London	- January 13, 1977
Brampton/Mississauga	- January 20, 1977
Metropolitan Toronto	- January 26 and February 10, 1977
Hamilton/St. Catharines	- January 28, 1977
Ottawa	- February 3, 1977
Kingston	- February 4, 1977
Kitchener/Waterloo/Guelph	- February 9, 1977

The special interest group and association hearing was held at Queen's Park on February 17, 1977 and the provincial conference in the City of Toronto on February 18 and 19, 1977.

Observations on the hearings

The Study Group was impressed by the quality of presentations made at the hearings and particularly by those persons who spoke with great concern about the future of condominiums, not just short-term considerations affecting them personally. On the whole, the Study Group found encouraging support for the condominium concept, as demonstrated by the excellent turnout and active participation at the public hearings, the number of briefs received and the media interest shown in the Study Group's activities. Both the satisfactions and the frustrations of condominium living were bluntly expressed.

As might be expected, the views stated at the public hearings differed in the level of comprehension of condominium living and in attitudes toward the priority of problems and various methods of solving them. Basically, this divergence of opinion and awareness was related to the roles played by the various interest groups involved with condominium living.

The one common theme heard throughout the hearings was that, despite the problems, condominiums were considered by most people to be a housing choice that was here to stay. Most owners' comments were marked by a definite pride in condominium ownership and a sense of obligation to future generations of owners.

Form of the report

Recommendations are interspersed in the chapters rather than being located at the end of each chapter. This has, on occasion interrupted the flow of discussion. Readers are advised, in those cases, to continue reading as if the recommendations were not there.

Some recommendations could appropriately appear in several different places. In those cases, the recommendations were placed in those chapters where the discussion best fit.

For economy of style, references to sections of The Condominium Act refer only to the section number. References to other Acts include the name of the Acts.

The problems can be solved

It is the Study Group's intention that this report serve as a practical reference document on condominiums, as well as a guideline for change. Therefore, the report is not restricted to recommendations for legislative change.

The report examines, not just current problems, but also problems that could occur unless preventative action is taken.

Government intervention alone will not solve all the problems related to condominium living, nor can government be expected to intervene in every dispute between residents and the industry, although it has the responsibility of ensuring that laws relating to condominiums are obeyed. Individuals and groups, both on the development and the owners' side, must work together with government to improve the standards of condominium life. Based upon the generally forward-looking attitude and high degree of motivation present in people connected with the condominium field, the Study Group is confident that, in time, the goals of improvement will be reached.

Chapter 1

Approval process

The existing system

One of the most common issues raised during the course of the Study Group's hearings was the length of time it takes to register a condominium corporation. It is important to note that this complaint was raised by both the development industry and the condominium owners.

The developers' concern was that they were required to finance projects over long periods of time and were therefore unable to put economical units on the market.

The purchasers' concern rested on the fact that they were required to take occupancy of their units before they had title to them. Thus, they were living in units which they had ostensibly bought yet were paying rent for anywhere from three months to two years.

The process through which a condominium proposal must go before the condominium can be registered as a corporation is an involved and complex one. To aid in illustrating the process, two charts have been prepared. Chart 1 is an overview of the applications which must be made by the developer. Chart 2 highlights the critical path of the planning approval process, and incorporates some portions of Chart 1 so that reference may be made to time and sequence.

The following is a simplified explanation of the present system:

1) Project initiation

Approximately 90% of all condominium applications in the province are for a piece of land that is a block described on a registered plan of subdivision approved under Section 33 of The Planning Act. The municipality and numerous government agencies have scrutinized the plan of subdivision thoroughly, the developer has paid levies to the municipality, and the Ministry of Housing or a delegated regional municipality has, after evaluating all factors and concerns, issued its final approval.

As part of this process, the site is often zoned for some form of multi-family residential use. Since the majority of condominium proposals are on existing registered plans of subdivision, the discussion will proceed on that assumption.

The developer evaluates present market conditions to decide what form of multiple housing should be built.

2) Preliminary discussion with municipality

The developer approaches the municipality to determine its general condominium policy (if one exists), its attitude towards highrise versus townhouse, any special requirements or problems associated with the specific site, specific requirements of the zoning by-law, and lot levies. At this time he may or may not advise the municipality that he intends to build condominiums.

3) Site plan

The developer has the site assessed in relation to soil factors, drainage, topographic features, and other environmental concerns. He then has the site plan and architectural drawings professionally prepared.

4) Application to municipality for building permit

Most urban municipalities require that site plan approval under Section 35a of The Planning Act be obtained prior to the issuance of a building permit. Municipalities such as Mississauga require the developer to give a declaration of intent to develop either a condominium or a rental complex.

Section 35a of The Planning Act gives wide powers of development control to a municipality which has an official plan. The municipality may, through by-law, prohibit the issuance of a building permit until all requirements and standards of the municipality have either been complied with or agreed to in a signed agreement (Section 35a(4) of The Planning Act).

A by-law under Section 35a may require agreement with the developer on the following site plan requirements:

- Widening of highways that abut the land being developed or redeveloped.
- Subject to The Public Transportation and Highway Improvement Act, facilities to provide access to and from the land, such as access ramps and curbsings, including the number, location and size of such facilities and the direction of traffic on them.
- Off-street vehicle parking and loading areas and access driveways, including the surfacing of such areas and driveways.
- Walkways and all other means of pedestrian access.
- Removal of snow from access ramps, driveways, parking areas and walkways.
- Grading or change in elevation or contour of the land and the disposal of storm, surface and waste water from the land and from any buildings or structures on it.
- Conveyance to the municipality, without cost, of easements required for the construction, maintenance or improvement of any existing or newly-required watercourses, ditches, land drainage works and sanitary sewage facilities on the land.
- Floodlighting of the land or of any building or structures on it.
- Walls, fences, hedges, trees, shrubs, or other suitable ground cover to provide adequate landscaping of the land or protection to adjoining lands.
- Vaults, central storage and collection areas and other facilities and enclosures as may be required for storing garbage and other waste material.
- Plans showing the location of all buildings and structures to be erected on the land and the location of the other facilities required by the by-law.

Chart 1 - Overview of applications which must be made by developer

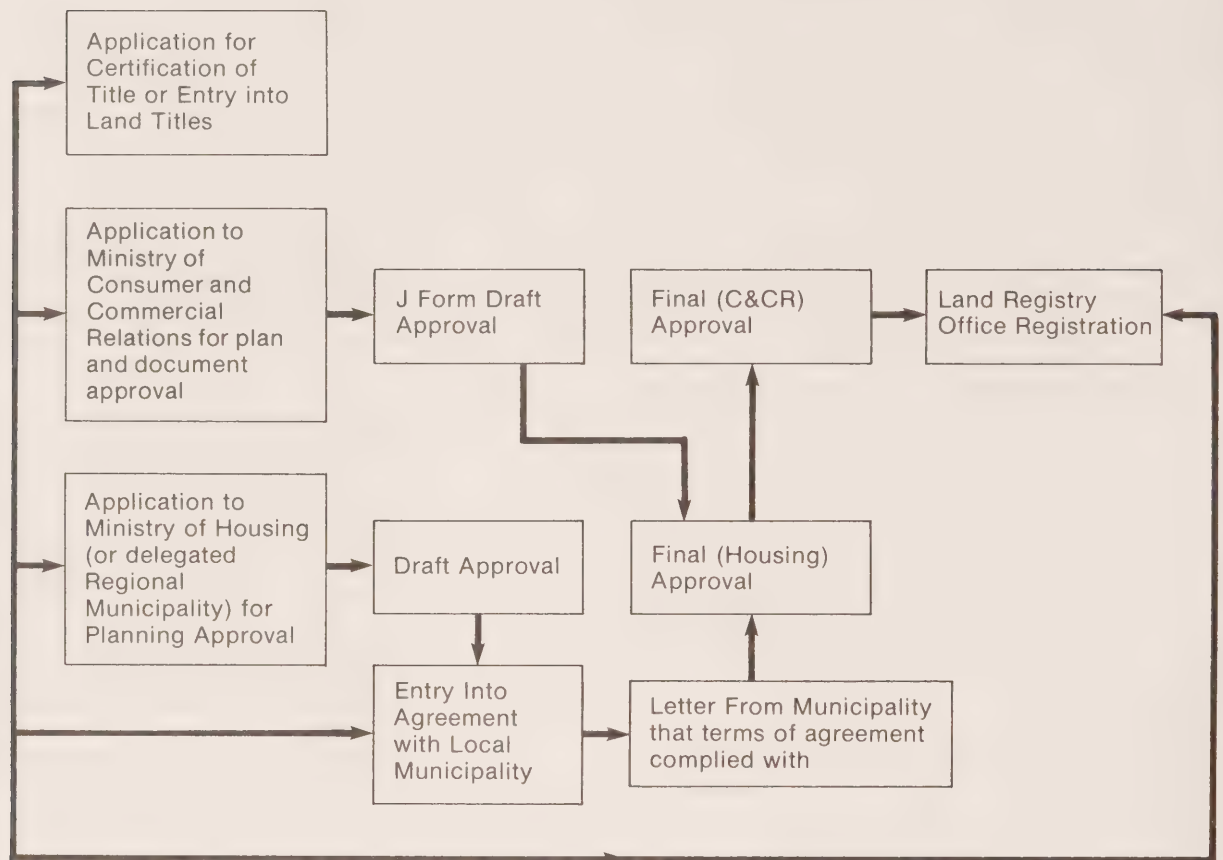
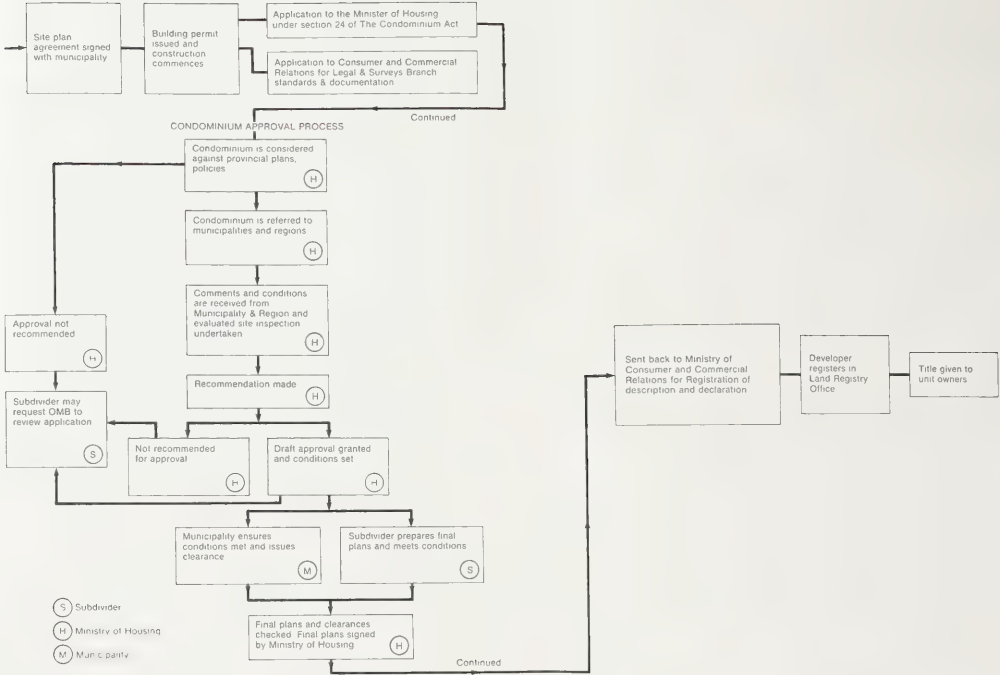
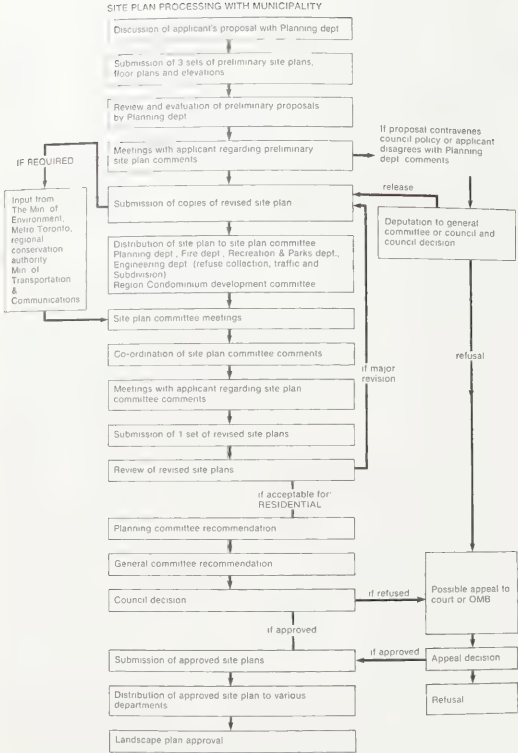
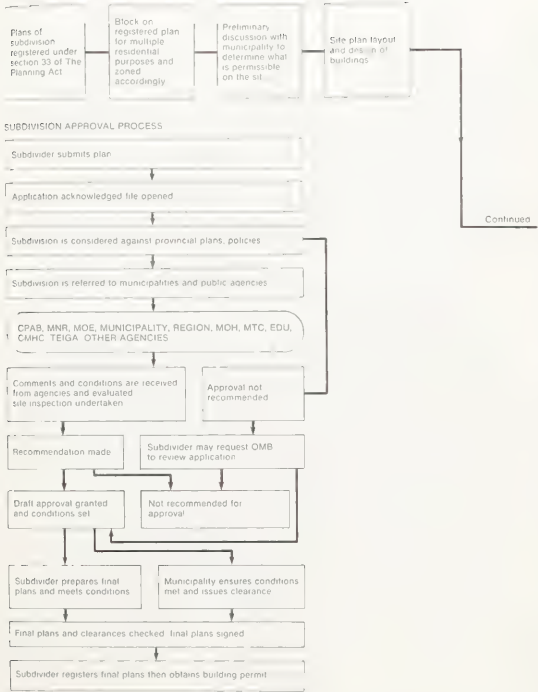


Chart 2 - The existing planning approval process



- Perspective drawings and plans showing building elevations and cross sections of industrial and commercial buildings and residential buildings containing 25 or more dwelling units.

If the development is to be condominium, the site plan should depict: the type and number of units proposed; the layout of the units and those portions of the site shared by the owners, such as internal roads, underground services, common elements, utility areas, parking areas, and recreational facilities; proposed landscaping; any other matters required under Section 35a of The Planning Act.

To analyze the developer's proposal, the municipality circulates the plans to internal departments and agencies. Normally, once the agreement is achieved, it can be registered on title and the building permit can be issued.

5) Application to the Ministry of Housing
Section 24 (2) of The Condominium Act requires that prior to the registration of a condominium description, the approval of the Minister of Housing is required under Section 33 of The Planning Act. Most projects are under construction or nearing completion at the time of the application. The process undertaken by the Ministry of Housing is outlined in Chart 2.

If the proposal is part of an existing, recently registered plan of subdivision, the Ministry consults only with the local municipality, and the regional municipality, if one exists.

Many municipalities will re-circulate the site plan to all their internal agencies. Some re-circulation may be quite legitimate since conditions and standards can change over time, and some time may have elapsed between the two processes. Delays can also occur if the developer has not disclosed his intention to build a condominium at the site plan stage, since the municipality may require different standards or conditions for condominiums than for rental buildings. This may even necessitate another written agreement with the municipality to bring the project into line with municipal policies. If the building is nearing completion, changes can be a very expensive burden.

Some municipalities use this second circulation as an opportunity to extract additional levies from the developer. If the developer has committed his project to one of the federal or provincial programs that require price ceilings, it can be very awkward. The Study Group was advised that some projects had been delayed because a municipality refused to consent to registration of the condominium until additional levies were paid.

6) Applications to the Ministry of Consumer and Commercial Relations

a) The Condominium Act requires that if the land is in an area to which The Land Titles Act applies, then the land must be placed in the Land Titles system before the condominium can be registered. If the land is not in an area in which The Land Titles Act applies, then the title must be certified under The Certification of Titles Act. Both applications require many months of procedure and should be commenced as soon as the developer decides to build a condominium in order that registration of the condominium not be delayed.

b) The developer's surveyor must submit prints of his proposed property description, and structural plans and draft copies of the proposed condominium declaration to The Ministry of Consumer and Commercial Relations for approval. The plans may be compiled from information shown on the architectural plans and verified by the surveyor at a later date when construction is completed.

The Ministry of Consumer and Commercial Relations checks the plans against any surveys of surrounding lands, for agreement with the structural plans and to ensure that there is no conflict between the description and declaration.

Draft approval of the documents (known as the "J" Form) is then given. From the submission of the documents to their draft approval, delays often occur because of insufficient staff in the Ministry. The Ministry reviews the documents only for adherence to the minimum requirements of The Condominium Act and not for internal consistency or for the protection of purchaser (Section 3 (1) of The Condominium Act).

7) Registration and transfer of title

The period between ministerial draft approval and final approval for condominium registration can vary from one month to well over a year. This can be a very critical stage, but the timing is dependent upon the developer, the municipality and, in some cases, the mortgage company. In all likelihood, people are living in the project in accordance with agreements of purchase and sale, and are paying rent.

Prior to the Ministry of Housing issuing its final approval for registration (see Charts 1 and 2), a letter of clearance is required from the municipality, stating that the developer has satisfied all of its requirements.

Approval from the Ministry of Consumer and Commercial Relations is also required to indicate that the description is satisfactory (Section 4).

Some mortgage companies stipulate that a certain percentage, sometimes as high as 80% of the units must be sold prior to their giving their required consent to registration (Section 3 (1) (b)) (see chapter on Lending Institutions). In a soft market, this requirement can cause a lengthy delay in registration.

Once the plans are endorsed with the Minister's signature, Ministry of Housing officials send the documents to the Ministry of Consumer and Commercial Relations, who in turn forward them to the local registry office. The declaration and description may then be registered by the developer (Section 2 (6)).

In most land registry offices it takes less than two days from the registration of the condominium to the time the registry office has set up ledgers showing the title to each unit and is ready to receive individual mortgages and transfers of title to purchasers. The land registry offices in Toronto and Brampton, however, have experienced longer delays because of the large volume of condominiums processed and insufficient staff.

We recommend that the Ministry of Consumer and Commercial Relations review staffing requirements of its survey standards branch and the land titles division of the Toronto and Brampton land registry offices in order to allocate sufficient personnel to the condominium approval and abstracting process.

To summarize, the Ministry of Consumer and Commercial Relations is responsible for checking that the condominium description and certain provisions of the declaration comply with The Condominium Act. The Ministry of Housing co-ordinates planning analysis and approves the division of property under The Planning Act. It is the municipality's responsibility to approve the site plan and ensure that construction standards meet the Ontario Building Code requirements.

Recommended approval process

After careful review of the registration process, the Study Group is convinced that the entire procedure should be overhauled. Our view of a new planning approval process is detailed in the following recommendations and in Chart 3. The new process is an attempt to register condominium projects faster and more efficiently.

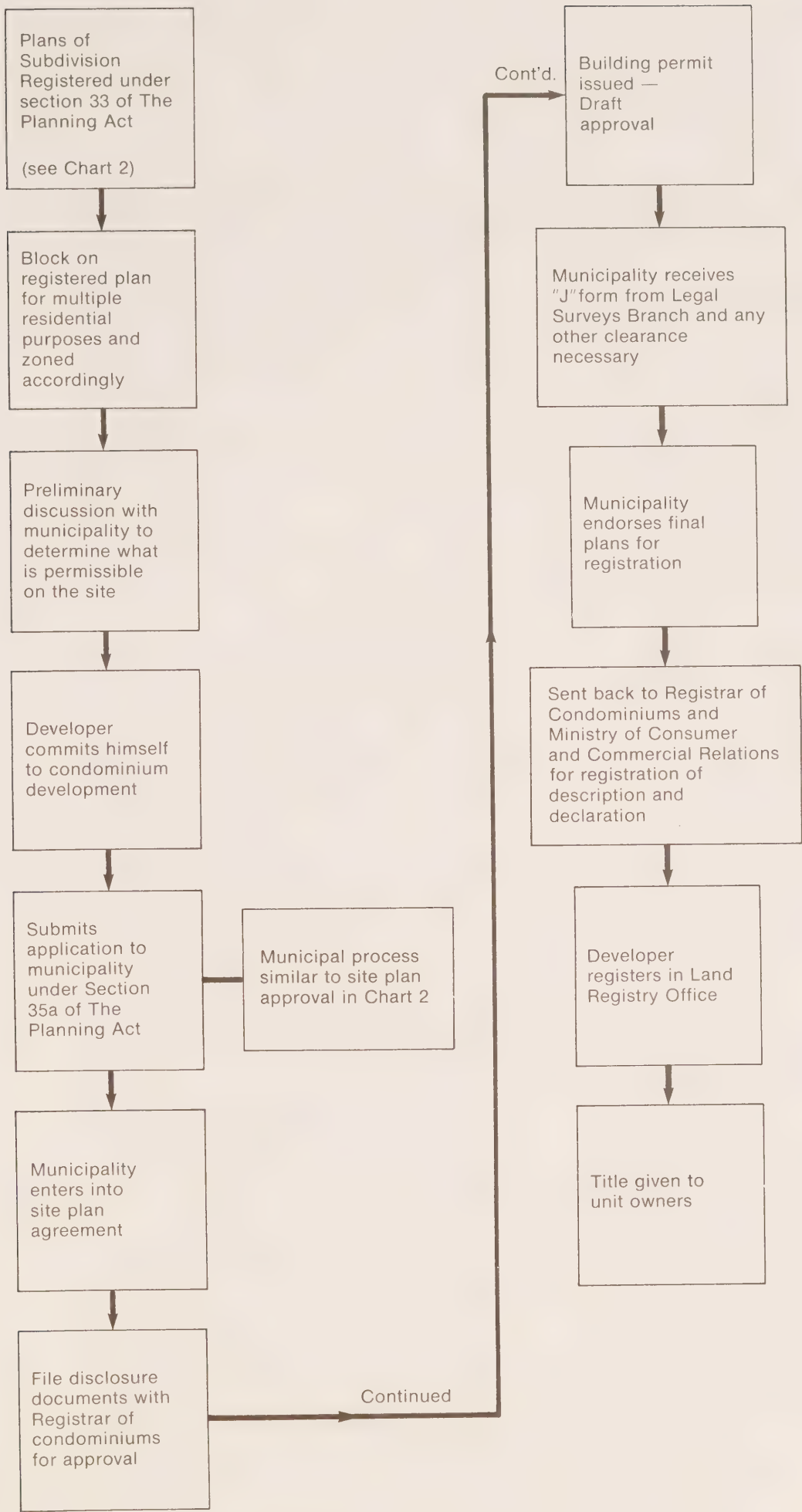
As the municipality is responsible for planning evaluation, including consideration of municipal housing mix, it is the municipality that determines whether a project is rental or condominium.

Since it is the local areas which are most affected by new development, and since it is the policy of the Government of Ontario to give greater decision-making powers to municipalities, the approval of condominium development should rest with this level of government. In order that local government has the input which is necessary in the field of condominiums, the draft plan of condominium should be tied to the issuance of the building permit and the role of the Ministry of Housing in the registration process should be eliminated.

Once the developer has stated his intention to the municipality to build a condominium, he should be required to enter into a site plan agreement. This agreement should outline all those items the local government will require before it will approve the project for condominium registration.

This process should reduce the delay that arises from the nondisclosure of the intention to build a condominium. If the local government is aware of the developer's intention at the outset, the requirements for condominium development will be imposed at the earliest stage possible.

Chart 3 - The new planning approval process



Recommendation No. 1:

The new approval process (Refer also to Chart 3): If an approved zoning by-law is in place, and the site is on a block of land described on a registered plan of subdivision, then:

A. The builder-developer discloses his intention to the municipality to develop a condominium project.

B. The builder-developer applies to the municipality for a site plan agreement under Section 35a of The Planning Act, and a building permit.

C. The municipality processes the site plan application to ensure that all municipal standards and policies are adhered to.

D. The municipality enters into a development agreement with the builder-developer setting out the conditions and standards of development. Levies should be determined at this stage, if they have not already been determined at the plan of subdivision stage.

We are attempting by this process to put the developer and the local government in the position of having all the demands and requirements involving the project known at the outset.

E. The builder-developer submits documentation for a disclosure statement to the Registrar of Condominiums (see chapter on Registrar).

Currently, no municipalities have the right to approve condominium documentation, although some are performing this function anyway. Under the new process, document approval will be the exclusive jurisdiction of the Registrar of Condominiums and will be a condition that must be met before the builder-developer can proceed with the proposed project.

F. Prior to the issuance of the building permit, the purchaser may only enter into a non-binding reservation agreement which the purchaser can terminate at any time up to 10 days after he receives his copy of the documents as approved by the Registrar.

G. After the site plan agreement is finalized and notice of approval received from the Registrar of condominiums, the municipality issues the building permit. The building permit becomes the draft approval (see chapters on Purchasing a Condominium and Approval Process).

H. The builder-developer starts construction.

I. The builder-developer submits his proposed declaration and description to the Ministry of Consumer and Commercial Relations for a review as to the registerability of the documents.

J. The municipality receives the "J" form from the Ministry of Consumer and Commercial Relations and any other clearances necessary as a result of conditions imposed in the development agreement.

K. The municipality, once satisfied that all the terms of the agreement have been carried out and after a detailed inspection of the site, endorses the final plans for registration. Upon completion to the satisfaction of the Ministry of Consumer and Commercial Relations and the local government, registration can take place.

By having the developer disclose his intention and enter in a site plan agreement, the local government will be required to issue final approval on the basis of the developer having met the terms of the site plan agreement.

L. The actual registration of the condominium will be effected by filing the declaration and description in the local land registry office and with the Registrar of Condominiums.

Advantages of the new system

The advantages of the recommended approval process are evident. It places the approval authority for the condominium where it belongs, at the municipal level, and fits in with the philosophy of local authority and local responsibility. It also removes the duplication in the process. By tying the approval process to the building permit and site plan agreement, the proposal goes through the municipal system once and not twice. This means that everyone involved should have clear cut policies and standards to judge the merits of each and every proposal. Additionally, it forces the developer to disclose at an early stage his intention to develop a condominium.

Another advantage is that the municipality has one opportunity to charge levies and cannot go back at a later date to increase the levies. Levies should be determined in the site plan agreement, if not already agreed to at the subdivision stage, and should be adhered to.

No binding agreement of purchase and sale will be entered into before draft approval. This will prevent purchasers from tying up their capital without a commitment that the project will become a condominium.

Elimination of duplication in the approval process should also reduce the time period that purchasers live as tenants in condominium developments awaiting registration.

The new process puts the onus on the municipality to ensure proper standards, since it will be solely responsible for approval. Section 35a(5) of The Planning Act gives a municipality the authority to enforce site plan agreements.

The new process will be the catalyst to encourage municipalities to have adequate standards and guidelines in properly-formulated policies, and will eliminate the ad hoc approach that is used today. The rules of the game must be spelled out clearly for all to understand and to point out the levels of responsibility.

Changes to legislation required

If the recommended process is accepted, amendments to The Planning Act and The Condominium Act would be required to bring this new system into force. The following are the various pieces of legislation that must be amended.

Recommendation No. 2:

Section 29 of The Planning Act be amended:

A) To require that where no municipal structure exists, the Minister of Housing be the approval authority.

This is necessary in Northern Ontario where the lack of organized municipalities may mean that Section 35a would not apply. Under these circumstances, the Minister of Housing should retain his authority to enter into agreements.

B) To require that where a municipality has no official plan and cannot use Section 35a of The Planning Act, the project be part of a registered plan of subdivision approved under Section 33 of The Planning Act.

This should only affect resort condominiums. It is necessary since not all municipalities in Ontario are covered by official plans and therefore capable of using Section 35a.

Recommendation No. 3:

Section 35a of The Planning Act be amended:

A) To define "development" in subsection (1), and amend the definition of "redevelopment" to provide that conversion-to-condominium applications be covered.

Section 35a was not designed to control condominium development and needs certain amendments to handle all situations.

B) To empower the municipality to impose such conditions as the Minister of Housing may impose under Section 33(5), subject to the appeal provisions of Section 33(7).

This amendment refers to the Minister's power to impose general conditions which, in his opinion, are advisable before approving a plan of subdivision. This does not extend to the approval of documentation.

C) To empower the municipality to require that an application for first registration in the land titles system, or for certification of title, be commenced prior to issuance of a building permit.

D) To clarify that the municipality has the authority to impose standards of width and construction material on all internal roads.

This clarification is essential if the problems of present owners in a matter not currently within the control of Section 35a are not to be repeated. The chapter on Municipal Policy and Standards is more detailed on this aspect, but we cannot over-emphasize the need for a clear legislative mandate.

E) To remove the 25-unit minimum in the municipality's authority to require architectural drawings.

F) To enable the municipality to establish planning, engineering and construction standards which will minimize long-term maintenance and operation costs.

Recommendation No. 4:

Section 24 of The Condominium Act should be amended to reflect the new system.

Chapter 2

Construction

The problem of construction deficiencies in condominiums was one of the issues most frequently dealt with at the public hearings. Most deficiencies are not the result of builders' deliberate attempts to construct inferior structures; rather the deficiencies come about from the nature of the construction industry as a whole.

Recommendations for changes can only be examined in the light of why deficiencies occur and what action has already been taken to improve the purchaser's lot.

Design and construction considerations

The preliminary architectural drawings and the architectural portion of the final working drawings of the condominium are normally produced by an architect retained by the builder.

Practice has varied in the industry as to the degree of the architect's involvement, which has run from providing stock plans based on the size, shape and permitted density of the site to providing architectural drawings designed for the specific site or to providing detailed supervision of construction.

Since 1974, the Ontario Building Code has required that buildings exceeding 6,000 square feet, or three stories, be designed by architects or professional engineers, who should also be responsible for field review of the building during construction to ensure adherence to the design. This should increase the involvement of professionals in actual construction. However, the requirements for field review by architects or professional engineers under the new Ontario Building Code have not yet produced a body of buildings where it is possible to identify any significant improvement in quality control.

On receipt of the architectural drawings, the builder will retain structural, electrical and mechanical engineers, either separately or as a group to add their plans to the working drawings.

A good builder may even have his architect retain the various engineering consultants so that their plans may be reviewed for consistency with the architect's drawings.

Based on the working drawings, the builder requests bids from contractors to do various portions of the work, such as concrete forming, drywall and painting. Depending on the complexity of the project, there may be several layers of contractors in a pyramid of contracts and sub-contracts. Many large builders have some in-house capacity or else have sub-contractors who regularly work for them. However, the actual workers are drawn from the same pool of labourers no matter who the contractor is.

The majority of condominiums referred to in submissions were constructed prior to the supervision requirements of the 1974 Ontario Building Code. The only quality control on their developments was by the builder's site superintendent.

Despite the new building legislation, today, as several years ago, the site superintendent is still the first line of quality control. The site superintendent, who may be the builder himself, a regular employee, or, more often, an individual hired for the project, occasionally has staff to aid in the office work and field supervision; usually, however, he has little back-up staff.

Construction deficiencies

There are several reasons for construction deficiencies in condominiums:

1. The craft of building has become increasingly de-personalized in the mass nature of modern construction; thus, tradesmen move from building to building and builder to builder, feeling little direct involvement and interest in the product, with such lack of feeling often affecting the quality of workmanship.
2. The Mechanics' Lien Act, by allowing a tradesman to register a lien and thereby disrupt mortgage advances, makes it very difficult for the builder to withhold payment due to shoddy workmanship.
3. The marketing of condominium units to persons of moderate income means that there is a smaller margin of profit than in other types of building. Therefore, some builders concentrate cost-cutting on such site services as supervision and quality control.
4. The nature of building codes from time to time and place to place has been largely reactive to problems which have occurred. Such codes have not provided a design handbook or standard of workmanship for the building industry.

The Ontario Building Code

Prior to 1974, municipalities were authorized to pass by-laws under The Planning Act regulating certain aspects of building structure. Practice varied from the passing of few, if any, by-laws to the adoption of and additions to the suggestions of the National Building Code, which was produced by the National Research Council of Canada as a model code for municipalities.

Because of the lack of uniformity in building requirements from municipality to municipality and the lack of any minimum standard, the Government of Ontario produced a minimum standard code based on the National Building Code.

The Building Code Act, 1974, requires municipalities to appoint chief building officials and the necessary inspectors to enforce the provisions of the Code. No one can construct a building unless a permit has been issued by the chief building official and the municipality has examined the builder's plans and specifications prior to issuing the permit.

A Building Code Commission was created to resolve disputes between inspectors and others regarding technical interpretation of the Code. A Building Materials Evaluation Commission was created to examine and research materials, techniques and design; this latter commission was intended to improve construction quality.

The Code superseded all municipal by-laws relating to construction of buildings. The powers of the municipalities to pass by-laws regulating building structure were made subject to The Building Code Act. Municipalities can still pass by-laws setting standards in areas not covered in the Code, but the majority of municipalities have not done so.

Many municipalities feel that their power has been preempted by The Building Code. Some even refuse to pass by-laws relating to maintenance and occupancy of buildings as permitted in The Planning Act, where this would imply a control of construction.

A review of the Ontario Building Code indicated that the consumer largely misinterprets the Code's intended meaning by considering it to be a design handbook and standard for the quality of workmanship.

It appears that the Code is primarily concerned with preventing fire and the collapse of a structure. We note that at least one municipality is challenging the Code for the right to require higher fire safety standards. The Code also provides data for design of such items as heating and air conditioning systems.

The Code is weak in the areas of insulation, sound-proofing, workmanship, quality and the establishment of standards for the design life of materials and construction.

These items are of major importance. The Code, in essence, declares the minimum standard of safety for a particular area. It does not make the distinction between a method of high-maintenance and low-cost construction and a low-maintenance, high-cost method of construction. Thus, the Code has not considered, and indeed was not designed, to consider the cost benefits of various types of construction.

Construction complaints

Numerous condominium construction complaints were presented at the public hearings.

Solutions to a few, such as the tale of the fire engine rushing to the scene of a fire and sinking to its axles on an improperly-compacted internal street, are dealt with in other parts of the report (see chapter on Municipal Policy and Standards). Others, such as the story of the woman who sat down in her bathtub and sank with the tub through the floor into the unit below, will, we hope, be dealt with by the HUDAC New Home Warranty Program.

However, certain general issues were raised that must be mentioned:

1. Purchasers complained about a lack of sound-proofing.
2. Purchasers complained about design characteristics that adversely affect utility usage, because this cost is often the main component of common expenses. Most complaints related to bulk metering, single-glazed windows and the lack of insulation as being damaging because many highrise units are electrically heated and therefore energy expensive.

Because of the publicity given to energy shortages, some purchasers are demanding more economical design where methods of reducing utility use are provided, such as separate temperature controls in rooms, protection of entrances from loss of heat, proper landscaping to provide wind protection in winter, and more efficient heat production methods such as heat pumps.

3. Owners complained that internal street systems generally did not provide access for adequate snow or garbage removal and were rarely built to the usage standards of municipal roads. Internal services such as sewers and water mains are rarely inspected by the municipality or designed for easy access, maintenance and repair.

4. People complained that workmanship is shoddy. There is a tendency for purchasers to consider poor finishing as a matter being a breach of The Building Code. Even where workmanship is adequate, purchasers tend to view cracks from normal shrinkage and settling as an indication of bad design or construction.

5. People complained about a host of items, including aluminum wiring as a potential fire hazard, galvanized metal piping with its potential for quick corrosion, materials with short life spans which have to be replaced out of common expenses, and underground garages designed without proper protection against water penetration. A more recent problem is the discovery that brick-clad highrise buildings have a tendency for the brick to peel away from the structure and fall because of the differing shrinkage rates of the brick facing and the concrete load-bearing walls.

A condominium purchaser expects higher quality construction than does a tenant because, as an owner, he anticipates a longer period of residency and consequently is more concerned about matters which affect his maintenance costs and equity.

6. Many owners complained that inadequate attention had been given in the Building Code to the policy consideration of the construction quality of buildings offered for sale, as distinguished from buildings to be retained by an owner-builder.

Recommendation No. 5:

The Ontario Building Code be reviewed for the purpose of:

A. Establishing a standard of design and workmanship desirable for a building retailed to the public, as distinguished from the minimum requirements necessary for the safety of occupants.

B. Establishing standards on the lifetime costs of maintenance and repair.

C. Establishing standards on sound-proofing.

D. Ensuring energy-efficient design, including increased insulation.

E. Establishing the Building Code as a minimum construction standard, with the municipality being given the power to establish higher standards.

Inspection

The foregoing concerns are design and construction faults not controlled by the Ontario Building Code. There are just as many defects which are a result of violations of the Code.

It is important to emphasize that under the present system, the site supervisor employed by the builder is the only person responsible for controlling adherence to specifications, and for control of faulty workmanship.

The municipal inspector makes intermittent inspections of the site. Some of these inspections are mandatory, such as at the backfill, roof, pre-occupancy and completion stages. Others are merely a result of the inspector's route of sites which must be inspected and the number of problems the inspector expects to have with the builder's adherence to Building Code standards.

The municipal inspector inspects for conformity to the Building Code and zoning requirements and does not inspect in detail the quality of workmanship.

Often the main municipal inspector makes only general inspections and relies on specialist inspectors for detailed work. The municipality may have specialists in plumbing, health, or structural work. The municipal fire department usually makes the most stringent inspections and often finds design problems not caught by the municipality at the site plan stage.

Other organizations also do specialized inspections. Ontario Hydro inspects and certifies electrical work and the Ministry of Consumer and Commercial Relations inspects elevator installations. The Ontario Building Code now requires the builder to retain architects or engineers to inspect if the building is over 6,000 square feet in area or three stories high. The architects and engineers are responsible only for inspecting to ensure conformity with the design, not for construction quality.

Construction deficiencies still occur for several reasons:

1. Inspections are intermittent and are not intended to provide on-going site supervision.

Many examples of construction deficiencies were presented at the public hearings. One man, for instance, discovered that the insulation batting in several sections of his unit was missing, with only the paper covering affixed to the walls. Other insulation was found without its paper wrapping indicating that the wrapping had been removed and used to simulate extra insulation battings during a municipal inspection.

2. There are an inadequate number of inspectors in most municipalities.

3. Only in some municipalities are inspectors properly trained in areas outside their particular employment experience. The qualifications of inspectors range from experience as tradesmen to graduation from community colleges with training as architectural or engineering technologists.

4. Even now, professional inspection is merely to ensure conformity to the design and rarely relates to the detail or standard expected by a purchaser.

Enforcement of Code and inspection

Various suggestions were made at the hearings as to who should be responsible for the quality of construction.

Some consumers felt that due to the time, cost and difficulty of suing a builder because of construction deficiencies, greater accountability for quality should be borne by the organizations that inspect condominiums.

Some owners suggested that the lender of construction money might be made liable. But in that case, there would probably be a reduction in the money available for housing, or an increase in the mortgage interest rate because of increased risk incurred by the lender.

Others felt that the municipality might be made liable. Currently, the law is in a state of flux regarding the municipality's liability to purchasers for failure to properly enforce by-laws. We are of the opinion, however, that there is little benefit in making the municipality specifically liable if inspection, by its intermittent nature, cannot truly control quality.

Perhaps the best course of action is to ensure that municipal inspections are made properly and with the resources adequate to reveal likely deficiencies.

Recommendation No. 6:

The Province of Ontario establish training standards for municipal inspectors and provide the municipalities with funds for educational programs which would allow the municipalities to meet those standards.

Deficiency correction

Normally, a purchaser inspects his condominium unit prior to occupancy and the builder agrees at that time to correct any items which might need repair. A few builders extend this procedure to the common elements and arrange for an inspection by the board of directors.

Correction of in-suite deficiencies identified at the pre-occupancy inspection is fairly common, but correction of common element deficiencies is less so. A few condominium corporations have taken the builder to court, such as in *Frontenac Condominium Corp. #1 vs. Joe Macciochi & Sons Ltd.* and have been successful, but the expense and time is substantial. One factor that adds to uncertainty in trying to recover costs by suing the builder is the unresolved question as to who has status to sue the builder. It is uncertain whether the condominium corporation, which has had no contractual relations with the builder, has the power to sue him over deficiencies to the common elements (see chapter on The Condominium Corporation).

Condominium corporations have attempted to protect themselves against a claim of inadequate authority by having a representative group of owners join with them to sue on behalf of all of the unit owners as co-plaintiffs. This duplication is wasteful.

Some doubt also exists as to whether the condominium corporation can settle an action against a builder without a difficult internal procedure because the right to the action might be an asset; thus, a settlement may be a substantial change in that right requiring an 80% vote of members. (Section 14(1)). (See chapter on Financial Administration.)

Warranties

Construction work performed and building materials supplied are often warranted to the builder by the tradesman or the manufacturer. Should defects occur after the condominium corporation is registered, a cooperative builder will call on the warranty on behalf of the corporation to have the necessary repairs made.

Problems arise for the unit owners, however, when the work or materials are not warranted or if the warranty is personal to the builder and the builder does not cooperate in calling on the warranty. The tradesman or manufacturer is under no contractual obligation with the condominium corporation to make repairs. Because of the wide range of construction practices and warranty types, it is not feasible to impose a legislative warranty scheme, aside from the HUDAC New Home Warranty Program.

Recommendation No. 7:

The builder acquire warranties, where possible, in a form capable of transfer to the Condominium Corporation and, on the election of a Board of Directors by the Unit Owners, turn the warranties over to the Condominium Corporation.

HUDAC New Home Warranty Program

On January 1, 1977, The Ontario New Home Warranties Plan Act, 1976, came into effect to ease the problem of rectifying deficiencies. The Act created a non-profit corporation to administer the warranty plan, to assist in the conciliation of disputes between vendors and owners, and to administer a guarantee fund.

The Act states that no person can act as a vendor or a builder of a new home unless he is registered with the warranty corporation (the definition of "home" includes a condominium unit). Purchasers can verify that their builder is registered by requesting evidence of registration from him.

An applicant may be refused registration if he is not financially responsible or technically competent, or if his past conduct affords reasonable grounds for belief that his undertakings will not be carried on in accordance with law, integrity and honesty.

Every vendor of a previously-unoccupied condominium after January 1, 1977, warrants to the owner that it is constructed in a workmanlike manner and is free from defects in material; is fit for habitation; is constructed in accordance with the Ontario Building Code; and is free of major structural defects as defined in the by-laws of the warranty corporation.

Purchasers should note that the signing of an agreement of purchase and sale constitutes a sale under the warranty program. Thus, only purchasers who signed agreements after January 1, 1977, are covered by the program unless the builder voluntarily obtained such a warranty.

The warranty does not apply to the following: defects in materials supplied by the owner or purchaser; secondary damage caused by defects such as property damage and personal injury; normal wear and tear; normal shrinkage of materials caused by drying; damage caused by dampness arising from the failure of the owner to maintain adequate ventilation; damage resulting from improper maintenance; alterations, deletions or

additions made by the owner; subsidence of the land around the building other than beneath the footings; damage resulting from an act of God; damage caused by insects or rodents; damage caused by municipal services or other utilities; and surface defects accepted by the purchaser.

The warranty corporation will pay, out of its guarantee fund, any person who could sue the vendor for financial loss because of the bankruptcy of the vendor or the vendor's failure to perform the contract. It will also pay any owner who could sue the vendor because of a breach of the warranty.

A claim for a breach of warranty must be made within one year after the warranty takes effect or if there is a major structural defect within four years after the warranty takes effect.

For the purpose of the warranty, the condominium corporation is deemed to be the owner of the common elements and the warranty takes effect on registration of the condominium. The warranty for units takes effect from the date in the warranty certificate issued by the builder, which is the date the unit is completed for possession.

At the moment, the warranty limit is \$20,000 per unit for unit problems and not more than \$1 million, or \$20,000 per unit, whichever is the lesser, for common element deficiencies. The warranty corporation may also decide to perform work in mitigation or in lieu of damages.

Upon receipt of a complaint, the warranty corporation sends out an inspector. Complaints for those units and corporations covered by the warranty should be addressed to: HUDAC New Home Warranty Program, 180 Bloor Street West, Suite 702, Toronto, Ontario, M5S 2V6.

There are several difficulties with the HUDAC program:

- 1) An owner who purchased a unit after January 1, 1977, in a condominium registered before that date, is covered for deficiencies in his unit only and not for deficiencies in the common elements.
- 2) A condominium corporation registered after January 1, 1977, may find itself in the position of having the common elements completed, but having three categories of units:
 - a) units sold before January 1, 1977 and not covered by the warranty;
 - b) units sold after January 1, 1977 and covered by the warranty
 - c) unsold units for which there can be no claimant under the warranty.

The seriousness of these anomalies will depend upon the definition of units and common elements in the condominium.

3) A condominium corporation's warranty may expire before a Board of Directors, elected by purchasers, can make a claim if the builder delays passing control or management information for the year of the warranty. In these circumstances, an owner should go directly to the warranty corporation with his complaint.

4) The warranty corporation does not step into the position of the builder for the purpose of obtaining mortgage advances nor do its costs take priority over mechanics' lien or other claimants. Thus, the warranty corporation has little incentive to spend money for completion; rather, it regards each dollar spent as a dollar lost.

The cumulative effect of these difficulties is to render completion under the existing warranty program an unsatisfactory method of correcting deficiencies. The reason is that a large part of the effectiveness of the program lies in the willingness of the warranty corporation to take action. The warranty corporation makes its own by-laws covering the claims process and through making these by-laws complex or through simple inaction can render the legislation ineffective.

Discussions with persons who have had experience with the warranty corporation indicated that the warranty corporation has not taken an aggressive approach to resolving claims. In particular cases, where the bankruptcy of builders has left unfinished portions of the claim procedure, the warranty corporation has avoided action and asked that other parties such as lending institutions with money left to advance go in and complete.

Recommendation No. 8:

The Ontario New Home Warranties Plan Act be amended:

A. To empower the warranty corporation to act as a trustee to borrow money from a lender who has unadvanced mortgage funds on a condominium project. Such a loan to take priority over claimants whose claims are registered subsequent to the registration of the mortgage.

B. To empower the warranty corporation to use such money for the completion of units or common elements not covered by the warranty and any remainder of such money for full or partial satisfaction of warranty completion and repair costs.

Recommendation No. 9:

The warranties on the common elements take effect from the date the builder has ceased to have control of the condominium Board of Directors.

Existing deficiencies

Correction of inspection and code requirements and the HUDAC New Home Warranty Plan will reduce the deficiencies in new condominium housing, but, at present, there are a large number of condominiums that are faced with incomplete construction, building deficiencies or a poor standard of construction requiring extensive maintenance.

A few condominium corporations may be able to recover costs by suing the builder, but the corporations will have difficulty raising money for correction in cases where it is difficult to determine whether the problem stemmed from a deficiency or merely a design meeting minimum but still inadequate building by-law standards.

The problem of recovering costs was illustrated in a recent example where extensive repair of a corporation's roofing was estimated at approximately \$2,000 per unit. The corporation could not get a loan for the required amount because it had no assets to borrow against, and obviously a levy of \$2,000 on each unit owner was out of the question.

While the Government of Ontario should act, it should do so in a way that does not burden the province's taxpayers.

Recommendation No. 10:

The Government of Ontario guarantee loans through private lending institutions to condominium corporations not covered by the HUDAC New Home Warranty Program for the correction of construction deficiencies.

Condominium Corporations, other than conversions from rental buildings, registered after January 1, 1977, are covered under the HUDAC New Home Warranty Program.

Determination of deficiencies

One of the major difficulties for a condominium corporation is often the lack of information available regarding the location of plumbing and electrical services, and the design of other items which are not easily investigated, such as roofs.

Corporations are often able to obtain a set of original plans from the builder, but these may not represent changes in design during construction. The municipality is the only body with the inspection services and the ability to control the builder's actions sufficiently to ensure up-to-date information.

Recommendation No. 11:

The Municipality require "as built" plans to be filed with the Municipality on completion of construction. All such plans be made accessible to representatives of the condominium corporation in question.

Chapter 3

Municipal policy and standards

"In recent months, the Council has directed the Planning Department to review parking standards imposed on condominium projects, through implementing zoning by-laws. The problem of parking shortages within condominium projects is accentuated by the small proportion of public street parking made available to a condominium. This factor becomes even more critical when many large condominiums are located along major arterials where street parking is prohibited. In light of the present parking problems which are being encountered by condominium corporations, it may be necessary to increase the present parking requirements for multiple residential developments."

—From a brief presented by The Township of Gloucester.

During the course of the hearings, a survey was undertaken to determine what policies and standards municipalities had established to deal with condominium development. The results of the survey are listed on Chart 4. As can be seen, there is very little consistency among municipalities regarding condominium policy. Even within the same municipality, policies varied from project to project. Some municipalities were not aware of the powers they had to control development and had not set standards and policies for condominium development. In some municipalities it was difficult to determine what process they used to evaluate condominium development, let alone determine their standards.

Throughout the hearings, much criticism was levelled by condominium owners at what they perceived to be a failure by municipalities to accept responsibility for the quality of design and construction. Some of these complaints are listed below:

- a) Copies of the site plan agreement were difficult to obtain.
- b) Municipal inspections varied in quality.
- c) Internal road quality standards were inadequate.
- d) Internal road design made movement and servicing difficult.
- e) Recreational amenities were not always necessary and were costly to maintain.
- f) The mixing of townhouses and apartments in one corporation caused conflict.

The Study Group was concerned about the lack of formal policy at the municipal level and the fact that many municipalities did not enforce either the site plan agreement or their various by-laws.

Should the planning approval process be changed as recommended in the chapter on the Approval Process, municipalities will clearly be the responsible agency for condominium development within their jurisdiction. This will necessitate the adoption of policies and standards as well as the enforcement of agreements and by-laws.

Policy instruments

In order to use The Planning Act site plan approval process, the municipality must have an official plan. An official plan is a formal document endorsed by a municipal council and approved by the Minister of Housing under The Planning Act. This document determines general land use patterns and spells out policies and guidelines that will direct growth for that municipality. The official plan, unlike the zoning by-law, is meant to be a guide for growth, not a rigid set of rules. This ability to be flexible does not prohibit innovative approaches.

The official plan is implemented by zoning by-laws. The zoning by-law is a very rigid, standards-oriented document passed by the municipal council and approved by the Ontario Municipal Board. It very specifically dictates how the land is to be used, floor space requirements, front yards, side yards, and other factors.

It is also in the zoning by-law that the municipality defines "single-family". A number of briefs indicated that in certain projects the zoning by-law stated that each unit was to be occupied by a "single-family" but units were in fact occupied by two or three families. Concern was expressed about overcrowding and its inherent health and maintenance problems. It was indicated that little, if any, support was given by the local officials. In some cases, with many members of an extended family living in one unit, it was difficult to determine which members constituted part of a "single family" as defined in the by-law. One example that came to our attention involved 27 people living in a two-bedroom high-rise condominium.

Recommendation No. 12:

A. Municipalities provide a clear definition of "single-family" in their zoning by-laws and enforce the provision. In the absence of a definition of "single-family" in a condominium declaration, a condominium corporation be allowed to import a definition under the municipality's maintenance and occupancy by-law.

B. As an alternative, municipalities provide restrictions on the maximum number of persons per bedroom or per floor space under their powers to pass maintenance and occupancy by-laws.

The site plan agreement made pursuant to Section 35a of The Planning Act, was discussed in the chapter on the Approval Process. As was indicated, the municipality can have extensive control over development with proper use of this legislation. Unfortunately, many municipalities do not fully avail themselves of this provision, and to the detriment of future occupants do not enforce such an agreement.

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Recommendation No. 13:

Municipalities enforce their site plan agreements according to Section 35a of The Planning Act.

Recommendation No. 14:

Municipalities adopt consistent standards relating to width and construction of internal roads, internal services and other facilities required for condominium developments. Water and sewer easements be required to follow the road wherever possible.

The chapter on municipal services outlines this need in greater detail. Higher standards will mean higher initial costs, but it is hoped, lower long-term maintenance costs.

Recommendation No. 15:

Municipalities have formal guidelines dealing with matters such as parking requirements, service facilities and design criteria.

Policies can be adopted by a resolution of council or they can be a formal amendment to an official plan as has been done by the Borough of Etobicoke. Policies are essential to the evaluation of new developments and conversions and for the imposition of proper development and design standards.

Recommendation No. 16:

Municipalities develop policies and guidelines for condominiums and adopt them as amendments to their official plans. These policies address all matters listed under Subsection 35a(2) of The Planning Act and consider the following:

A. The size and complexity of condominium corporations: apartment and townhouse condominiums to be treated differently:

It is important to consider complexity as well as size because several condominium corporations have discovered that where common recreation facilities are provided to several corporations, for instance, there is a potential for conflict.

Size remains a problem. Concern was expressed that very large corporations were unruly and difficult to manage. The larger the corporation, the less was the likelihood of developing in owners a sense of community spirit, co-operation and involvement in corporation affairs.

B) Parking, both in the number of spaces per unit and guidelines for the location of visitor parking areas (see chapter on Municipal Services).

C) Whether internal streets in new and existing condominium projects should be public streets (see chapter on Municipal Services).

D) The services the municipality intends to provide and whether or not they will be provided on a chargeback system (the chapter on Municipal Services makes recommendations pertinent to this).

E) Design standards for condominiums if different from rental accommodation.

It is essential that the municipality establish clear policies on condominium conversions so that discrimination cannot be claimed by the development industry, and there is less likelihood that municipal decisions will be challenged.

F) Designs that treat the issue of private spaces with more sensitivity.

In high-density accommodation, people need their own private spaces. This can be built into the design, with a little imagination and creativity.

G) Encouraging garbage storage areas adjacent to public roads so that they are accessible to municipal trucks.

This will be useful where municipalities intend to provide garbage pick-up services.

Although conversions were not raised as an issue at the hearings, recommendations pertinent to conversions are justified for several reasons, including the age and maintenance problems inherent in an older building, the fact that conversions are not covered under the HUDAC New Home Warranty Program, and the lower selling price of many conversions compared to newer condominiums.

Recommendation No. 17:

Municipalities adopt an amendment to their official plan to provide policies on condominium conversion, including the following considerations:

A) Conversions have the same standards as new condominiums.

B) The issues of:

- i) The overall mix of rental and freehold accommodation in the municipality.*
- ii) The availability of rental accommodation similar to that proposed for conversion, in the general neighbourhood, for those existing tenants who wish to remain in rental accommodation.*
- iii) The vacancy rate for rental accommodation in the municipality.*

C) The process that conversion applications should go through, e.g., that the developer be required to indicate the quality of the building and its life expectancy (see chapter on The Registrar).

D) Detailed inspection before recommending draft approval.

To initiate the new procedure and have it understood, it is necessary that workshops be held.

Recommendation No. 18:

The Ministry of Housing have its appropriate officials organize a series of workshops for municipalities across the province to discuss the new approval procedure and the methods available to administer it.

Chapter 4

Municipal services

"While condominium owners pay municipal taxes at the same rate as owners of individual houses, we receive fewer services. We feel that municipalities should be ordered to regularly clear roadways on condominium property and pay for the power of street lighting on such roadways."

—From a brief presented by York Condominium Corporation No. 78

The problem of municipal services was raised at every public hearing. Many condominium owners complained that, although they had been taxed at the same rate as other home owners in the same municipality, they had not received the same level of municipal services. They stated that snow was not plowed from roads on condominium property; improperly parked cars were not ticketed; and garbage was not collected by the municipality. Condominium owners resented having to pay for private service. The injustice they perceived, their treatment as "second-class citizens", seemed to disturb them as much as the actual monetary loss.

Background

Services provided by the municipality do not relate directly to property tax paid, any more than services provided by federal and provincial governments relate to income and sales taxes. Municipalities, at one time, were mainly in the business of servicing property with sewers, water and roads. Today, municipalities service people as well as property. It is difficult to measure the benefit of most services provided through municipal taxation such as education, social services, landuse planning, fire and police protection.

Moreover, municipalities are not legally empowered to provide services to maintain roads and sewers on condominium property, just as they are not empowered to maintain roads and sewers on other private properties. Legally, plowing snow from a condominium road is analogous to plowing snow from a private driveway.

One reason for the popularity of condominium housing in Ontario in recent years is the fact that the cost is generally less than that of other forms of housing. This low cost relates directly to the lack of municipal services. In a single-family non-condominium project, the municipality requires the developer to build roads, sewers and other services to a high standard because the roads will be assumed by, and therefore maintained by, the municipality. Each buyer pays his share of the higher cost of these services in the purchase price of his house. Since municipal standards for condominium roads are lower than for public roads, the cost of building a condominium is less and thus the purchase price of a unit is lower, but the long-term maintenance costs of what may be substandard roads must be shared by the condominium owners and not by all taxpayers in the municipality.

Although condominium homeowners may not be receiving municipal services on condominium property, they are benefiting generally from local services such as trunk sewers, police, fire, social services, education and the use of public roads throughout the municipality.

Unfortunately, in the past, some municipalities have regarded condominiums as a totally private concern, because no land internal to the development is deeded to the municipality, and they have therefore exercised no site development control.

When the development is to be rented, the owner/builder remains responsible for maintenance problems. It is quite different when a condominium corporation must take over problems not of its own making. Since the municipality has responsibility for development control, it has an obligation to assume the interests of future condominium owners.

The reasons for the existing lack of municipal services on condominium property do not preclude a municipal responsibility for amenities on present or future condominium property. Under The Planning Act, municipalities have extensive powers of development control as was discussed in the previous chapter on Municipal Policy and Standards. A municipality can determine the facilities to be provided by the condominium developer and have an agreement describing the developer's obligations registered against title. This enables the municipality to control the placing of underground services, roadway design, access, parking facilities, landscaping, etc. Proper site planning can prevent many of the complaints levelled at the municipality, such as parked cars blocking narrow streets and insufficient access for fire trucks and garbage trucks.

Even though the municipalities' most effective role can be played at the development stage, the provincial government should make legislative amendments that enable municipalities to assist existing condominiums with their servicing problems. Equity for condominium owners can best be achieved by improving public services to condominium corporations, where possible, rather than through tax rebates or other means.

At present, local governments do not have specific legal authority to provide services on condominium property. Under Section 92 of The British North America Act, local governments are the responsibility of the provinces. All powers of local governments must be delegated by the province through provincial statute. The courts, over the years, have interpreted this very narrowly. Their decisions have established that municipal powers must be specifically spelled out in provincial legislation. The legal situation regarding services has been unclear for two major reasons: there are only minimal references in Ontario legislation to

municipal powers relating to provision of services on private property; and, there is no mention in Ontario legislation of providing municipal services on condominium property. There is a need for legislative amendments to clarify this situation.

Roads

Many people purchasing condominium housing are unaware at the time of purchase that the internal roads in the development are the property of the condominium corporation and not of the municipality. The truth sometimes does not dawn until the corporation is faced with expensive maintenance costs.

Some condominium owners suggested to the Study Group that internal roads in a condominium should be public and that there is no advantage to having a private road system. Private roads automatically limit other municipal services, such as garbage collection and snow-plowing provided to the condominium corporation, and burden condominium owners with heavy road maintenance costs. Other condominium owners expressed a preference for a private road system, indicating that this protects their privacy and contributes to a sense of community by providing an available place for street fairs, dances, and other owner activities, which are not readily organized on public roads.

Options

A municipality has four possible policies that could be pursued in attempting to prevent road problems in new condominiums: it could insist that private roads were of a quality standard equal to that of public roads. It could agree, if there is legislative authority given, to provide services on condominium roads. It could assume roads internal to condominiums as municipal roads. It could encourage the development of other forms of housing on public roads (see chapter on Housing Choice). Each of these policies will be examined in turn. Recommendations are made only to allow for the possibility of a policy. The selection of the particular policy should be up to the municipality.

1. Standards for internal roads

In the chapter on The Approval Process, it is recommended that Section 35a of The Planning Act be amended to enable municipalities to set standards of quality and size for internal roads in condominium developments and inspect roads to ensure that those standards are met. This would give municipalities the power to ensure that roads within condominiums were of sufficient quality to prevent exorbitant maintenance costs to condominium corporations.

If the municipality insisted that the internal condominium roads were of the same construction quality as public roads, the initial cost to condominium buyers would increase but the long-term maintenance cost would decrease.

2. Servicing internal roads

Municipalities should be enabled to provide services on private condominium roads where the condominium requests them and where a suitable arrangement can be made. The municipality might, in some instances, find it necessary to charge a fee to the condominium corporation because the narrow roads, difficult to maintain and plow, might require special equipment. However, charges levied by a municipality would probably be lower than those of a private contractor. According to a brief submitted by March Township and its condominium corporations, the township, at one time, plowed snow from condominium roads at cost, which was about 50 per cent lower than that of a similar private service.

Recommendation No. 19:

The Municipal Act be amended:

A. To define a condominium road.

B. To enable municipalities to provide road maintenance, including snowplowing, on condominium roads.

C. To enable municipalities to levy fees for that purpose, if necessary.

3. Municipal status for internal roads

Municipalities might consider insisting that condominium roads be built to municipal standards to be deeded to the municipality as public roads. It is assumed that these roads would be of the same quality as any other municipal roads, but would be narrower than the standard width of 66 feet. Under Section 450 of The Municipal Act, a road of less than 66 feet can be established as a municipal road if it is approved by the municipal council and by the Minister of Housing. The Ministry of Transportation and Communications has indicated that it would include such roads in its calculations for roads subsidies to municipalities if these roads have been approved by the Ministry of Housing.

We are confident that the Ministry of Housing, with the concurrence of the municipal council, would approve such roads wherever safety was not sacrificed, and where servicing and maintenance seemed feasible.

Recommendation No. 20:

A. Municipalities consider the possibility of assuming as public roads the roads internal to condominiums when a development is first considered.

B. The Ministry of Housing grant approval of municipal status for roads of less than 66 feet that are on condominium property, wherever feasible.

4. Other forms of housing

There is some question about the advisability of condominium housing on public roads. Once the concept of a private community has been diluted to this extent, perhaps other forms of freehold housing provide a better alternative. Elaborate arrangements for collective decision-making seem unnecessary in a development which differs from any other housing project only in the width of its streets and the size of its lots. Perhaps zero lot line would be preferable (see chapter on Housing Choice).

Existing roads

The policies described above are available to the municipality when it is considering new development. Only one is really applicable to existing condominium development and that is the second, the possibility of municipalities providing services on private condominium roads. However, the municipality would be more likely to find it necessary to charge fees in the case of existing roads because it would have had little or no control over the quality of the roads with a resulting increase in maintenance difficulties.

There is a slight possibility that some condominium roads within existing condominiums could be brought up to the standard that the municipality is insisting on for the assumption of roads as public roads within new condominiums. Condominium corporations interested in deeding their roads to the municipality might explore this possibility. It is assumed that the condominium corporation would pay for bringing the roads up to standard. Corporations might require some assistance in raising the necessary funds.

Recommendation No. 21:

Government-guaranteed loans be made available to condominium corporations for the purpose of bringing roads up to municipal standards.

Parking

Improperly parked cars are a common complaint of condominium owners. The problem is directly related to the narrowness of condominium roads and the fact that condominium roads often cannot be used for parking. Older neighbourhoods, by contrast, have few and sometimes no garages or driveways, but wide roads which can be used for parking. Not only do visitors to condominiums attempt to use the narrow roads for parking, but sometimes the owners themselves use roads, not wanting to bother to put a car in its designated parking space. Municipalities, in approving condominium designs, must look at the street system in conjunction with parking spaces, when considering parking. However, there is some indication that expectations regarding parking are too high. Parking facilities should not expand indefinitely to meet the demands of condominium owners. When establishing standards, municipalities should weigh this consideration against others, such as the high cost and best use of residential land.

Nonetheless, there will always be improperly parked cars on condominium roads from time to time, just

as there are on all roads, public and private. At the present time, municipalities have the power to establish fire routes under Section 354(1) of The Municipal Act, and cars parked on fire routes on private property can be towed away by the police. Once the municipality has passed a by-law to establish a fire route on condominium roads, there should be no difficulty in keeping it free of cars.

Municipalities can also pass by-laws providing for the ticketing and removal of cars parked on private property not designated as a fire route under Section 354(1) 112 of The Municipal Act. However, the section stipulates that only cars parked "without the consent of the owners" of the private property can be ticketed and towed.

Recommendation No. 22:

Section 354(1) 112 of The Municipal Act be amended to specify that, in the case of a condominium, the "owner" is a person delegated by the board to act for the purpose of this section notwithstanding that the car owner is a unit owner in the condominium project.

Some condominium owners expressed concern about a lack of cooperation from the police in dealing with parking and other problems. Some of these difficulties may result from inadequate communication and lack of understanding of condominium laws by police.

Recommendation No. 23:

A. A condominium corporation experiencing policing difficulties contact its local police department to set up a meeting to discuss mutual concerns.

B. The Ministry of the Solicitor General, with the assistance of the Registrar of condominiums, provide material on condominiums to boards of police commissioners (see chapter on Registrar).

Garbage collection

Many condominium owners complained of inadequate or non-existent garbage collection by the municipality. In most municipalities the garbage is collected only from a central place for both rental and condominium developments. However, some municipalities do collect garbage door-to-door within townhouse corporations.

The problem in this instance does not seem to be a lack of statutory authority. Legally, municipalities can go onto private property to collect garbage. The problem here seems to be one of practicality. Most municipalities, for example, will collect door-to-door in townhouse developments if it is physically possible. They refuse to do so when roads are too narrow or have insufficient turning space.

Recommendation No. 24:

Municipalities exercise greater development control over private condominium roads, and give consideration to the problem of waste collection at the design stage.

Recommendation No. 25:

The Municipal Act be amended to enable municipalities to levy fees, if necessary, to condominium corporations for special garbage collection.

As with snow removal, this recommendation would enable municipalities to assist condominium corporations in servicing problems, without burdening the municipality's taxpayers with expenses for special equipment and services.

Recommendation No. 26:

All legislation regarding municipal services on condominium roads exculpate the municipality from any action on the part of the condominium corporation for damage to private property.

Water and sewer

Condominium owners presented two major complaints regarding water and sewer services. The first is that they have to make private arrangements for maintenance and repairs on condominium property; the public utility or municipality, as the case may be, does not provide such service. The second complaint is that water is very often on one meter and one condominium owner has to support the excesses of another. A similar complaint is made about electricity.

The first complaint relates to what has been said about adequate municipal planning controls. At the design stage municipalities should insist that water and sewer pipes be within the public road allowance, where possible, and where this is not possible, that they follow the condominium road so that they may be easily located and serviced.

Recommendation No. 27:

Municipalities ensure that maintenance and repair are facilitated by insisting that pipes follow the road.

Recommendation No. 28:

Legislation be amended to enable municipalities or their public utilities commissions to maintain and repair water and sewer pipes on condominium property and charge a fee, if necessary.

At the present time, condominium corporations are responsible for the maintenance of fire hydrants that are on their property. Many condominium corporations are unaware of this fact and it is probable that many fire hydrants are not being maintained.

Recommendation No. 29:

Legislation be amended to require, in the interest of public safety, municipalities or their public utilities commissions to maintain condominium fire hydrants, and to allow them to charge a fee for such service, if necessary.

Metering

The issue of individual utility metering was raised many times at the hearings. Condominium owners resent having to pay for the wastefulness of others.

This is true for such utilities as water, electricity, natural gas and oil.

Presumably, bulk metering is less expensive for the developer to install, cheap to the unit owner because of a bulk rate and more convenient for the utility. It could also be argued that condominium owners should share the costs as well as the benefits of communal living. However, far outweighing either of these considerations are the resource-saving, particularly energy-saving, benefits of individual metering. If each owner is responsible for his own water or hydro bill he will keep a closer watch on the consumption of his household. If, in the future, there are severe energy shortages, individual metering could become essential.

Recommendation No. 30:

A. Municipalities and public utilities commissions insist on individual metering for all new condominiums.

B. Municipalities and the province consider assisting existing condominiums to convert from bulk to individual metering.

Street names and numbers

During the course of the hearings, the Study Group learned that large condominiums experience difficulties because they have only one address, the address on the public road. Internal streets are neither named nor numbered by the municipality. This often makes it difficult to receive mail promptly and for strangers to find specific households within the condominium development. This is particularly serious when emergency vehicles, such as fire trucks and ambulances, are trying to find a particular household. This problem would be eliminated if roads within condominiums were public roads.

It does not seem realistic to suggest that provincial legislation be enacted to enable municipalities to provide names and numbers on private roads because the municipalities' actions might imply some degree of responsibility for the streets.

However, one of the ideas that emerged during our investigations, which may provide a partial solution, is that existing condominium corporations consider a colour-coded map at the street entrance to facilitate navigation within the condominium property.

Service agreements

Once provincial legislation is enacted that enables municipalities to provide services on condominium property upon the request of the condominium corporation a general service agreement could be made.

Recommendation No. 31:

Municipalities draw up a service agreement with each condominium corporation, to be renewed annually. This agreement to outline exactly what services the municipality would provide and what, if anything, the condominium corporation might pay for these services.

Chapter 5

Lending institutions

Financing for a builder interested in constructing a condominium is usually provided by a major institutional lender because of the large amount of capital required to construct a multiple-dwelling project. Lenders capable of such financing include chartered banks, loan and trust companies, life insurance companies, some pension funds and certain government agencies such as Central Mortgage and Housing Corporation (CMHC) and Ontario Mortgage Corporation.

The major consideration common to most lenders is that the investment of money be secure, as the lender is obliged to repay its source of funds. Given this consideration, lenders will provide money for condominium development in direct proportion to the security of their investment. This question of the mortgagee's security must be borne in mind in examining this report. Any recommendation that jeopardizes this security will reduce the funds available for condominiums.

Types of financing

The financing available from the lending industry is of three basic types:

1. bridge financing — a straight loan from a chartered bank to provide money for paying tradesmen as accounts become due.
2. construction mortgage financing — providing money at certain stages of completion so that the builder may keep his bridge financing at a reasonable level.
3. takeout financing — long-term unit mortgage financing in which the debt is assumed by purchasers.

Construction and takeout mortgagees most directly affect the condominium process.

Letter of commitment

When a lender has decided to grant the loan, he issues a letter of commitment of funds.

A survey by the Study Group of commitment letters of 10 lenders reveals the following standard provisions:

- a) loan amount of the construction mortgage and the individual unit mortgages to replace the construction mortgage when the condominium is registered.
- b) term and interest rate.
- c) amortization of the unit mortgages (the length of time it would take to pay off a mortgage if periodic payments of the proposed amount of payment were made).
- d) payment of administration charges to the lender.
- e) amount of property insurance required.
- f) necessity of lender's approval of the condominium documents.

g) necessity for professional property management.

h) payment of the lender's legal, appraisal and other costs by the builder.

i) construction of the proposed buildings in accordance with approved plans and specifications.

Provisions that appear in the commitments of some lenders, but not all, include:

- a) the builder must sell a minimum number of units to approved purchasers before the lender will consent to the registration of a condominium.
- b) the builder must have the loan insured.
- c) the builder must pay a standby fee if he does not require money immediately.
- d) the principals of the building company must personally guarantee payment of the mortgage.
- e) purchasers' deposits and downpayments must be protected by being held in trust or insured (a provision now falling out of use because of the HUDAC warranty, which covers purchasers' deposits and downpayments).

When the builder signs an agreement to the conditions in the commitment letter, the lender retains a lawyer to search title to the property and to prepare, have signed and register the construction mortgage.

The construction mortgage is usually a printed form containing the builder's promise to pay back the money he has borrowed and an agreement that in the event the builder fails to make payment, the lender may use the property to raise money to pay the debt.

Nature of advances

As construction progresses, the lender advances money.

Because the value of the protection of the loan conferred by the mortgage is the value of the property, the lender periodically inspects the property to determine the value of the construction in place. The lender then calculates how much it would cost to complete the building, and releases the difference to the builder, less a holdback in case there are claims by unpaid tradesmen.

It should be emphasized that the current practice of lenders is to have the construction inspected primarily to determine the value of the work in place. The inspection organization employed by the mortgagee may examine the structural integrity of the building or adherence to the plans and specifications provided originally to the lender; but, the inspection is in no sense a quality control.

The nature of lender inspections is best illustrated by the variations in inspection practice within the industry. For example, fairly detailed inspections are conducted by Central Mortgage and Housing Corporation inspectors for mortgages insured under the National Housing Act. Some lenders, however, in non-NHA loans, simply accept certificates from the builder's architect or engineer.

Liability for construction quality

At the public hearings, it was suggested that because the lender has reviewed the working drawings and has inspected the construction, the purchaser is entitled to rely on the lender to ensure that there are no gross errors in the specifications, and that the building has been built in reasonable accordance with the plans and good building practice.

In a Nova Scotia law suit recently, the purchaser of a single-family dwelling successfully argued that the lender was liable for construction deficiencies, although the lender's mortgage application stated that inspections were only to ensure reasonable conformity with construction standards and not for the purchaser's protection (*CMHC vs. Graham* — Nova Scotia Supreme Court, Trial Division).

The decision turned on whether, by approving purchasers, reviewing plans, and inspecting, the lender was engaged in a joint venture with the builder. At least seven condominium corporations in Ontario have relied on the case to join their major construction lender as a co-defendant in a law suit against their builder for deficiencies. None of these cases have yet come to trial.

Lenders are not willing to undertake liability for inadequate construction, and not willing to ensure that purchasers' requirements will be met. In fact, the lenders generally stated that they would refuse to lend money in the condominium field if liability were imposed on them. The responsibility for the quality of construction lies rather with builders, municipal inspectors and an adequate building code. (see chapter on Construction.)

Recommendation No. 32:

No liability be placed by legislation on lenders for the quality of design or construction.

Remedies and delay in registration

Because the value of the lender's remedies relates to the value of the property, the lender will usually not provide more than 85 per cent of the money to be advanced on the mortgage until after the condominium is registered, even though construction is completed.

If the lender sells the condominium property prior to its registration, the property can only be sold wholesale. After registration, the property can be retailed to purchasers or wholesaled to an investor who in turn will sell retail to purchasers.

The wholesale value of a rental property is usually at least 15 to 20 per cent lower than its retail value because this is the extra money that a vendor can get from the purchaser of a unit over someone who merely wishes to rent a unit.

The value of the property as a rental building may be even less if the building has particular design features such as in-suite laundry facilities, for which there is little rental market due to the higher rent that would be required.

After registration, but before title is passed to any individual unit purchasers, the lender may also wish to sell the property wholesale in order to avoid the lengthy and cumbersome process of selling individual units. Purchasers may look to the HUDAC Warranty for protection of their money in this situation.

The lender wishes specifically to avoid a situation in which only a few purchasers have title, preventing sale of the building as a rental property, yet an uncertain real estate market means a long and costly program of selling the remaining units.

One method of avoiding the situation is for the lender to prevent the builder from registering the condominium until a substantial number of purchasers have been obtained.

The lender is required to consent to the registration of the property as a condominium, according to Section 3(1)(b) of The Condominium Act. The builder, under Section 24a(1)(a), covenants, in each agreement of purchase and sale of a unit, to take all reasonable steps to register the condominium without delay.

Entry into a commitment agreement with the lender which provides that the property will not be registered until a certain sales level is achieved is probably sufficient to render the statutory provision unenforceable (see chapter on Purchasing a Condominium for recommendation).

As yet, there is no clear definition of the reasonable steps which a builder must take to register a condominium, nor is there any legislative authority to compel the lender to expedite registration.

The lender, before consenting to registration, will examine the proposed declaration and may examine the proposed by-laws and contracts to be entered into by the proposed condominium corporation.

If the lender is lending under the provisions of the National Housing Act, the lender will require Central Mortgage and Housing Corporation approval of the documents. If lending conventionally, he may insist upon the use of a form more or less standard in the industry.

To prevent major changes in documents occurring after drafts have been given to prospective purchasers, careful builders have the form of the documents approved prior to entering into the sales campaign (see chapter on The Condominium Corporation for recommendation).

Approval of purchasers

The builder's sales campaign may begin at any time before, during or after construction. In practice, the builder ascertains from the take-out lender what financial requirements the lender may have for the acceptability of prospective purchasers. He forwards to the lender the applications to assume the unit mortgages of those purchasers likely to qualify.

Traditionally, a lender examines the financial capacity of a purchaser to assume a mortgage by examining the purchaser's fixed expenses and concluding that the principal, interest and taxes to be paid annually by the purchaser should not exceed 30 per cent of the purchaser's annual gross income.

In a single-family dwelling, the purchaser may postpone repairs or do them himself or cut back on utility use if he is in financial difficulty. In a condominium, however, the purchaser must pay monthly common expenses for the maintenance of the property. This may include items which he could do himself on a single-family dwelling, such as painting or landscaping, or which he would never have to undertake.

It was suggested at public hearings that some lenders have not considered the significance of the fixed payment of common expenses, and that inexperienced purchasers to their detriment have relied on the lender's financial expertise in determining their capacity to carry a condominium unit.

Some of the common expenses can be determined as those which also have to be paid by a single-family dwelling purchaser on which the lender's experience is based. Thus, including the entire amount of common expenses in the 30 per cent shelter allowance is not always appropriate.

As the ratio of shelter costs changes from time to time according to the costs of other necessities, this is not a matter appropriate for legislation. Nonetheless, it is vital that purchasers be helped in avoiding getting into debt over their heads because of a financing arrangement that does not present a true picture of costs to them. Losses to the lender resulting from abandonment of the condominium unit by a purchaser who cannot afford the monthly costs should also be prevented.

Recommendation No. 33:

Lenders include 50 per cent of the estimated annual common expenses in the gross debt service ratio of principal, interest and taxes in determining a purchaser's eligibility for financing, or such other percentage the lender deems appropriate given the nature of the proposed common expenses.

After registration

Assuming the construction lender and the take-out lender are the same lender on registration of the condominium, several courses may be followed in the preparation of unit mortgages for purchasers to assume.

Where the lender has fixed the sum to be allocated to the property, individual mortgages for specified amounts are registered against the units. After the lender is satisfied that the unit mortgages are registered correctly, the construction mortgage is discharged.

Where the lender sets the amount of the unit mortgage according to amount the purchaser wishes to assume or where the lender registers a unit mortgage only on a sale, the construction mortgage may remain on title to all the units until the last unit is sold. Alternatively, the construction mortgage may be partially discharged as each unit is sold (refer to chapter on Termination).

Unit mortgage and assumption agreements

Unit mortgages are similar in form and in consequence to the construction mortgage.

There is the promise to pay and the right of the lender to go against the property in default of payment. There are also several rights exclusive to the unit mortgage.

For example, the unit mortgage usually provides that the right of the owner to vote at condominium corporation meetings is assigned to the lender.

When the purchaser of a unit receives title to his unit from the builder, he usually assumes from the builder the burden of paying the unit mortgage as part of the purchase price.

Assumption of this debt is ordinarily done through an assumption agreement signed by the purchaser, the builder and the lender. The agreement provides:

- a) a direction from the purchaser to the lender authorizing the lender to continue making mortgage advances to the builder;
- b) an agreement by the purchaser to assume the promise in the unit mortgage by the builder to make payments on that mortgage; and, the agreement by the lender to look to the purchaser to pay the debt;

c) a variation in repayment terms whereby the amount of the mortgage, the interest rate, or the dates of payment of the mortgage may be changed.

Some of the consequences of the assumption agreement are examined in the following:

a) The builder will require that the purchaser do nothing which might interrupt the final advance to the builders of that 15 to 20 per cent, of the mortgage money, which was the difference between the wholesale and retail value of the unit.

As the direction to pay money to the builder is good only if it comes from the unit owner, the builder will attempt to prevent a resale of the unit until the builder has received his money. Any delay in that final advance will inhibit the unit owner from reselling.

b) Although the purchaser assumes the unit mortgage, the unit is still encumbered for a while with the construction mortgage, which is registered against the entire property.

The Condominium Act provides that any unit and its common interest may be discharged from such an encumbrance by payment of a portion of the sum claimed. This amount is determined by the proportions specified in the declaration for sharing the common expenses. The assumption of the unit mortgage may be a payment of such an encumbrance. A difficulty, however, would arise where the values of the individual unit mortgages did not accurately reflect the percentage distribution in the declaration, or where the purchaser was assuming a reduced unit mortgage as a result of an increased downpayment and the increased portion of the downpayment had not been paid by the builder to the lender.

The purchaser in such cases may have to pay the difference between the mortgage assumed and the proportionate share of the construction mortgage, in the event of a default by the builder on the construction mortgage. The situation is compounded by the variation in accounting practice in the mortgage industry.

Technically the lender, on the replacement of the construction mortgage by the unit mortgage, should distribute in its accounting the money advanced under the construction mortgage among the unit mortgages. In this way, each unit mortgage will reflect the percentage of money actually advanced on the construction mortgage.

This practice gives rise to the problem that if there are lien claimants and the lender wishes to complete the building, he cannot exclude the claims of the lien claimants by selling all the units under his power of sale without also selling the interests of the unit purchasers. The lender is therefore forced to make an application under Section 34(2) of The

Mechanics' Lien Act for permission to complete the work. As the section is primarily for work necessary to make property saleable and the units have already been sold, there is some doubt as to its success.

Some lenders, however, treat the unit mortgages of those units, which were first sold as fully-advanced, with the mortgages on the remaining units as unadvanced or only partially advanced.

This practice gives rise to the problem that when the lender wishes to complete the common elements and charge the cost to the amount of money he can recover from a sale under his power of sale, before he must turn over excess proceeds to other creditors, he will have difficulty in justifying total completion of the entire project as a necessary expense in completing a few units.

The HUDAC New Home Warranty Program may mean that lenders no longer have to worry about completion. However, mortgage advances should be able to go to HUDAC to aid in the completion so that money will be available for completion (See chapter on Construction).

Other lenders treat all unit mortgages as being fully-advanced, although the construction mortgage was not fully advanced.

This presents the lender with the problem that interest that is paid by purchasers on money not advanced must be credited to the builder or the unit owner and it is difficult to prove from advancing records the full advancing in the face of claims from creditors.

Recommendation No. 34:

Lenders distribute advances on the construction mortgage among the unit mortgages on registration.

In any of these cases, the purchaser will wish evidence that the mortgage being assumed is in good standing and that there are no arrears of interest to increase the amount outstanding on the mortgage beyond the amount of the registered unit mortgage. Where the mortgage being assumed has been reduced in the assumption agreement, the purchaser wants assurance that there are no interest arrears and the changes in the mortgage are reflected in the lender's records.

c) The general practice of all lenders is to release to the builder 15 to 20 per cent of the mortgage money which could be allocated to a unit on the transfer of title to a purchaser.

The effect of the final advance should be reflected in any mortgage statement issued by the lender.

Long term arrangements

After the assumption of the individual unit mortgages by purchasers, the lender's sole interest is in collecting the monthly payments of principal, interest and taxes.

The lender is obliged to collect taxes because the municipality's claim for unpaid taxes ranks in priority to the mortgage. The lenders have developed a system of collecting taxes in monthly instalments and remitting the money to the municipality on receipt of a tax bill.

If the tax bill is larger than the amount of money in the tax account, the lender charges the unit owner interest on the deficit at the mortgage rate.

Several lenders have experimented in the collection of condominium common expenses, but found that the condominium corporations were relying on the lender to collect arrears yet make prompt payment to the condominium corporation. As there was no priority over the mortgage for common expense arrears, and as many lenders adopted standardized computer systems in which this administration was an added expense, the lenders discontinued the collection (see chapter on Financial Administration).

Reluctance of lenders to refinance

Many owners of condominium units said they were having difficulty in arranging refinancing of their units on resale. This was because of the reluctance of many major lenders to refinance a single unit in a condominium development where another lender had provided a majority of the financing.

The Study Group poll of several major lenders showed that only one was prepared to refinance a unit in a project which he did not finance originally. Several reasons were given for the failure to enter a project.

First, the amount of research necessary to establish the workability of a project was far more than for the refinancing of a single-family dwelling. Second, the lender did not have voting control of the project.

A sampling of condominium unit registers in the land registry office (land titles division) in Toronto revealed that on resale, refinancing was done either by the original lender on the project, by a minor lender such as a finance or trust company with real estate sales interests, or by a second mortgage taken back by the vendor and subsequently disposed of.

It is evident to us that a condominium unit owner does not have the full range of refinancing opportunities that are available to the single-family owner.

Recommendations relating to standardizing documents and improving financial controls should alleviate the difficulty (see chapter on Registrar).

Chapter 6

Condominium insurance

"The large print giveth and the small print taketh away."

— Anonymous

Nature of insurance

It is necessary to consider insurance at length because it is probable that the majority of condominiums are improperly insured due to lack of knowledge on the part of agents, insurers, and condominium corporations.

The availability of money to a condominium corporation in the event of damage is important. Because it is possible for that money not to be available if the condominium is improperly insured, the insurance requirements for a condominium and for individual unit owners should be carefully examined by the condominium corporation and the unit purchaser's solicitor.

The condominium policy

Many early condominium declarations contained extensive insurance requirements. Few insurance companies were able to study these requirements and endorse and adapt their standard builder's construction period policies to meet these obligations. Even fewer companies were able to write an insurance policy specifically for condominiums. There remains today a considerable variation in the quality of coverage from policy to policy and in the technical sophistication of insurance agents, brokers and companies.

Defects exist because of failure to adhere to the requirements of the declarations of the policy, insufficiency in those declaration requirements, and general failure by the parties to understand the considerations involved. Some of these considerations are outlined below. The insurance policy considered here is of the type maintained by a condominium corporation. A unit owner's policy is considered separately.

Interests insured

Unless otherwise provided in the condominium declaration, a condominium corporation, by statute, is obligated to repair the units and common elements after damage.

Some declarations vary this by requiring the unit owner to repair his unit after damage, on the theory that unit damage is often caused by negligence of the unit owner. In any case, the condominium corporation must make any repairs that a unit owner is obligated to make but does not make within a reasonable time.

The definition of unit boundaries varies from one condominium corporation to another. So, it may be more or less important for a unit owner to repair his unit after damage for the protection of other unit owners. The most efficient solution is for the insurance policy maintained by the condominium corporation to *insure the interests of both the condominium corporation and the unit owners* who hold title from time to time.

Such joint insurance prevents the condominium corporation from having to wait for a unit owner to repair damage or to discover he has insufficient insurance before the condominium corporation can present a claim to the insurance company.

This joint insurance also protects the unit owner in the event that, after damage and a failure to vote for repair, the condominium is terminated and the corporation ceases to exist for the purpose of collecting insurance (see chapter on Termination).

However, as the condominium corporation does not own the property but merely has an obligation to repair, there is a possibility that the condominium corporation does not have an insurable interest in the normal form of policy, i.e., a policy insuring the buildings and not the obligation to repair and, in the payout of the policy, would only receive the sum of the unit owners' interests.

Manitoba, for example, has specifically legislated that the condominium has an insurable interest to alleviate these problems.

Recommendation No. 35:

The Insurance Act be amended to give the condominium corporation an insurable interest in the property.

Property insured

The condominium corporation usually contains an internal road system, outdoor recreation areas, out-buildings and underground trunk services not normally covered in an insurance policy's definition of buildings.

One method of making sure that all the property which could be damaged is covered is to insure the buildings and all services to the property line, and to define services as including both underground services, such as sewers, and above ground, such as roads. With this definition, additional coverage must still be specified, such as coverage of landscaping. Buildings must be defined as including all appurtenances, whether they form part of the buildings or not, such as carpeting. Another method of ensuring coverage is to insure all the units and common elements.

Both methods have their dangers. It is possible in the first method to omit something so that it does not fall within the extended definition of buildings. In the second, it is possible to omit something because it is not a common element but merely an asset of the corporation.

The latter omission could include carpeting not attached to the building and thereby not forming part of the real property; significantly, it could also include real estate owned as an asset of the condominium corporation, such as a recreation centre.

In any case, attention should specifically be paid to the proper insurance of the condominium corporation's personal property. As indicated in relation to the real property, it may not fall within the definition of buildings or of common elements in the policy. If there is such personal property, it may be wise to have an endorsement on the policy specifically referring to it.

The policy should clearly distinguish between improvements made to the units by the builder and improvements made by unit owners. This latter should not be covered by the condominium policy, but by an individual policy obtained by the unit owner.

Most insurance policies define units by the definition set out in The Condominium Act which defines units terms of their state at the time of registration. It is preferable to define unit as including any work done after registration by the builder in accordance with his architectural plans.

This separation of insurance on improvements avoids a possible dispute should the condominium be terminated. Without such separation, there could be disagreement, after extensive damage, over whether the insurance proceeds should be distributed as condominium assets in accordance with the declaration's schedule of common interests, or be distributed as unit owners' assets in accordance with the value of the units (see chapter on Termination).

As it is, there is ambiguity in some of the agreements with the trustees who would pay out the insurance proceeds; the ambiguity relates to the question of on what basis the money should be paid to unit owners on termination. The separation also avoids unit owners of unimproved units having to pay a portion of the insurance premium which could be attributable to improvements made by other unit owners.

The separation of improvements should not prevent coverage of improvements to the common elements made by the condominium corporation.

When examining a policy for the extent of the coverage, one cannot rely on the definition of what is insured. This is because most policies have a separate group of clauses excluding sections of the buildings. Most common exclusions include boilers and pressure vessels, plate glass and, on occasion, sewers and watermains beyond the foundation walls. For this reason, these exclusions must be carefully read by a condominium corporation and compared with what is intended to be insured.

Risk insured

There are several types of policies available. There are policies that insure against loss by fire damage, or fire with extensions to other damage causes such as explosion, falling objects, aircraft impact and smoke.

Coverage is also obtainable under the designation, "all risk", which is the more desirable coverage. This type of coverage insures against any event except those specifically excluded, such as flood or bursting of pressure vessels.

Property risk and coverage may also be extended to include such things as payment of the insurance trustees' handling fees, loss of business records, removal of debris, landscaping, TV antennae and other normal exclusions, or loss of business income.

Amount of coverage

Normally an insurance policy insures the depreciated value of property; that is, the insurer pays the original value less depreciation. This obviously presents problems when the money must be used in a time of cost escalation to repair or replace the original.

The normal non-condominium insurance policy also requires the insured to maintain insurance coverage on at least 80 per cent of the value of the construction. In the event that coverage is less, then the insured is deemed to be a co-insurer and the insurance company will pay only the percentage of a claim that is equal to the percentage of insurance on the building. To ensure that there is adequate money from the insurer to repair the building, the insurer must agree that the amount of insurance is sufficient and that the insurer will waive the co-insurance provision.

To prevent the depreciated value of the property being paid, the insurer should agree to pay the replacement cost of the repair.

The replacement cost provision should also include the costs of increasing quality of construction to the standards of any changes in the law. This is because the introduction of the Ontario Building Code has changed the minimum construction requirements of many municipalities; and, it is likely that the code will be amended to upgrade requirements for insulation, or other matters as recommended in this report.

Provision should also be made that the payment of one claim does not diminish the amount of coverage available for a later claim.

Loss payable

Naturally, it would be of concern to unit owners if the money paid by the insurance company went to each unit owner or to a member of the board of directors; the disappearance of an individual with the money would mean that the money would not be available for reconstruction.

Thus, most condominiums require the insurance proceeds to be paid to a trustee who will administer distribution of the money, in the event of repair, to the contractors doing the work and, in the event of condominium termination, to each unit owner or mortgagee as the case may be.

Because the trustee charges both a fee to maintain its status in the absence of a claim and a percentage of the proceeds in the event of a claim, some policies provide that for very small claims the money should be paid to the condominium corporation.

It is important that this money be paid to the corporation and not the "insured" or else the claim cheque would have to name each and every unit owner.

A problem arises in the practice of many mortgagees who are used to having a loss made payable to themselves, or themselves jointly with a property owner, and therefore insist on being named on the policy.

Some of the better insurance policies provide that the mortgagee named in the policy is insured in spite of any breach of a condition in the policy by the condominium corporation. They further provide for special notice to the mortgagee and the trustee of potential cancellation of the policy. The policies do not provide for money to be paid to the mortgagee unless the building is not to be repaired.

Insistence by the mortgagee, however, has led in some cases to loss being payable jointly to the insurance trustee and to the named mortgagee, with consequent delays in using the money for reconstruction.

Adjustment

In the event of a loss, someone must prove the claim to insurance proceeds on behalf of the condominium corporation and the unit owners, then settle the amount with the insurer.

As all unit owners are insured, it is possible that each owner would have to deal separately with the insurer unless the policy provided that the condominium corporation had exclusive rights to deal with the insurer. Good policies will permit the condominium corporation to delegate that right to a unit owner where a single unit is damaged.

Similar considerations apply to the right to amend the policy where it would obviously be difficult to have a unit owner contact the insurer with a request for a change in the policy.

Permissions

Insurance coverage is valid only where the risk contemplated by the insurer is the actual risk. Where a change in usage of a building increases the risk, the coverage may be invalidated. As the usage described in the policy is almost always "residential", special care must be taken that the insurer gives permission for units to remain vacant, for incomplete construction to be finished, for repairs to be carried out, and for the condominium corporation to carry on its normal business, including running a management office. If there is commercial space, this should be mentioned as well.

Waivers

The Insurance Act makes it a condition of most insurance policies that the insurer may elect to repair, rebuild or replace the property damaged instead of making payment.

What of the case where substantial damage occurs, the unit owners do not vote to repair and the condominium corporation is terminated? Such a condition would prevent the owners from taking the money and might leave them in the position of being tenants in common of a building they do not want (see chapter on Termination). In this instance, the insurer should waive its right to repair.

Insurance policies frequently provide that breach of any condition of the policy is enough for the insurer to refuse to pay a claim. A breach of conditions by one insured could disentitle other insureds from collection. Even where the policy provided that the breach would disentitle only the offender, other owners would be prejudiced if this reduced the total money available for completion.

It is thus necessary for the policy to provide that breach of a condition does not reduce the money available. Many policies, which purport to provide this coverage, restrict themselves only to a breach of a condition imposed by statute.

The insurer has a right of subrogation; that is, the right to sue on behalf of the insured to recover the insurance proceeds from the person who causes damage. Although insurers interpret their policies as exempting the insured from such a suit, a number of unit occupants are still unprotected by the policy.

It is necessary for the insurer to waive his right to sue on behalf of the insured against the condominium corporation, owners, owners' families and other dependents, corporation employees, mortgagees in possession, and other persons that the condominium corporation wishes protected from suit, except for arson, fraud and vehicle impact.

Other policy considerations

Insurers frequently refuse to make full payment on a claim where the property is covered by a competing policy so as to avoid having the insured receive double payment.

The insurers instead treat their policies as insuring just a portion of the loss in the same proportion that their policies bear to the total coverage by all the policies.

Because the condominium corporation cannot control the individual insurance efforts of unit owners, it is wise to provide that the condominium policy be *primary* insurance without any policy maintained by a unit owner being brought into contribution.

Because of the time taken for corporate bodies to react, the normal 15 days notice of cancellation of the policy should be extended to 60 days notice to the condominium corporation, insurance trustee and mortgagees named in the insurance policy.

Other insurances

Standard building policies must be supplemented by other policies based on the needs of a particular corporation. Some of these are outlined as follows:

A. Boiler and machinery insurance

In every highrise and in some townhouses, special attention must be given to mechanical equipment which works under pressure, such as boilers, because these are rarely covered in the building policy.

Many condominium corporations have obtained such policies but are unaware that a number of the considerations applying to the building policy also apply to the boiler policy.

The policy must insure the condominium corporation because of its duty to repair common elements. Also, it must insure the unit owners because, at present, in the event that regulation of the property by The Condominium Act ceases due to substantial damage and failure of the owners to vote for repair, then the condominium corporation is terminated and no longer exists to take the money. (Refer to the chapter on Termination.)

If the unit owners are added as insured, then the considerations about adjustment and amendment apply, as does the consideration of having loss payable to a trustee and having sufficient notice of cancellation given to the corporation, trustee and named mortgagees. Replacement cost to any increased standards necessitated by changes in the law would also be in order.

B. Liability

Liability of the condominium corporation and of the unit owners' interests in the common elements, excluding only their liability for acts of commission or omission in their own units, should also be purchased. The policy should have a cross-liability provision so that unit owners could recover from the insurer payment for losses caused by another unit owner or the condominium corporation. Payment to a trustee would not normally be necessary because the insurer would make compensation payable directly to a third party.

C. Auto and non-owned auto

Coverage is also necessary for automobiles or other vehicles owned by the condominium corporation or its employees, if used for performing duties. The condominium corporation could find itself liable as employer for the actions of an employee in his automobile if the use of the vehicle is part of his work, or, it may find itself in a similar situation if a unit owner is involved in an accident while working for the corporation.

D. Fidelity bonding

If any employees, officer or director handles money such as the collection of the common expenses, loss as a result of theft of the money can be protected by bonding.

E. Directors and officers

Insurance for directors and officers is available but not commonly used, due to its expense.

F. Insurance by unit owners

The unit owner should insure the contents of his unit and any improvements made to the unit that are not covered in the condominium corporation's policy.

The insurance should include a package, supplementary to the condominium corporation's general policies, insuring the unit owner against any failure by the condominium corporation to insure correctly. The insurance should also cover loss of use or occupancy of the unit.

Any insurance should contain a waiver of subrogation against the condominium corporation, managers, agents, employees, servants and against other unit owners and members of their households except for vehicle impact, arson or fraud.

Naturally, public liability insurance should also be maintained as well as automobile insurance, if the latter is necessary.

Other considerations

Most of the foregoing relates to what is available in insurance policies and what is advisable. Other matters must enter as well.

A. The mortgagee has a statutory right to apply insurance proceeds to the mortgage debt. Arrangements must be made with mortgagees to waive this right or to provide in the declaration that, by registering his mortgage, the mortgagee is deemed to have waived his right to the proceeds.

Many declarations state that no mortgage shall be registered unless the mortgagee waives these rights. Since most mortgages are registered without such a waiver, a problem exists as to the effect of the declaration provision in the absence of a penalty provision.

Recommendation No. 36:

The Mortgages Act be amended to deem the mortgagee of a condominium unit to have waived its right to have insurance proceeds applied to the mortgage unless the unit owners vote against repair. Such a provision be retroactive and all mortgages which might be invalid, by reason of a lack of waiver, be validated subject to this amendment.

The wording of this recommendation must be read in the light of the recommendations in the chapter on Termination.

B. Additionally, the insurer usually requires an appraisal before granting a stated amount/waiver of co-insurance provision. In the absence of that appraisal the condominium corporation should be prepared to get appraisals of the cost of reconstruction.

Many declarations now provide that annual or less frequent appraisals be done. Most condominium corporations are ignoring the provisions, rendering the boards liable for negligence if there is a loss because of insufficient insurance unless there is an indemnification provision in their by-laws.

C. Many mortgagees also insist that the condominium corporation be insured for the full value of the money outstanding on the unit mortgages although much of the value may be in the land. Premium reductions should be negotiated with the insurer because of the lesser risk if negotiations do not prove fruitful with the mortgagee. The mortgagee justifies his requirement as a cushion against inflation and rising construction costs.

D. The majority of condominium corporations do not look to their declarations and by-laws for their insurance requirements and many are in violation of their terms.

E. If, after substantial damage, the condominium corporation is terminated then the unit owners need someone, perhaps the insurance trustee, to negotiate settlement on the part of the unit owners. Many insurance trust agreements provide that the trustee is to act as a banker only, with no responsibility to prove claims or negotiate settlements. Thus, there is no one with the capacity to negotiate (see chapter on Termination).

Correction of the insurance problems requires: an amendment to The Insurance Act setting out statutory conditions for all future condominium policies; or an acceptable standard form policy universal in the industry and used without exception; or an analysis of all existing policies by the condominium corporations involved and renegotiation; or, if necessary, all of the above.

For those condominium corporations wishing to re-evaluate their insurance coverage, we have included the following brief checklist.

Condominium general fire insurance policy check sheet

Insured:	Corporation and unit owners from time to time
Loss Payable:	Insurance Trustee Named Mortgagee
Property Insured:	Units and Common elements and assets of corporation or Buildings including services to the property line and personal property of the corporation
Exclusions	
Coverage:	All Risk or Fire with extended coverage Exclusions
Amount:	Loss does not reduce coverage Stated amount/waiver of co-insurance Replacement cost To by-law standards To full appraised value Deductible
Adjustment:	Exclusive right of corporation Authorization to delegate to owner
Amendment:	Exclusive right of corporation
Permissions:	Normal business Vacant use Completion of construction Repair
Provisos:	No contribution (primary insurance) Trustee endorsement Named mortgagee endorsement
Waivers:	Insurer's right to repair Breach of statutory condition Subrogation against corp. owners, dependents, employees and mort- gagees in possession
Cancellation:	60 days notice to corp.trustee, mort- gagee
Conformance:	To declaration and by-laws
Extensions:	Trustee's handling fees Removal of debris Loss of business income Landscaping, TV antenna, valuable papers, etc.

Boiler, liability, non-owned auto, and automobile in-
surance policies may be checked against the same
list on the understanding that not all items are
applicable to all policies.

Recommendation No. 37:

The Insurance Act be amended to ensure statutory conditions for condominium insurance policies providing:

A. The insured as the condominium corporation and the unit owners from time to time.

B. The exclusive right of the condominium corporation to adjust or amend.

C. The condominium policy be primary insurance, not to be brought into contribution with unit owners' insurance policies on their units.

D. The insurer's right to repair be waived in the event of damage leading to the termination of the condominium corporation.

E. A breach of any condition in the policy not disentitle the insured to collect in the event the property must be repaired.

F. Cancellation be on 60 days notice to the condominium corporation and insurance trustee, if any.

G. Such other conditions as the superintendent of insurance deems advisable.

Recommendation No. 38:

Condominium corporations obtain all risk, stated amount replacement cost insurance, including replacement to any increased construction standard required by law.

Recommendation No. 39:

All condominium insurance policies be reviewed in the light of the discussions in the chapter on insurance.

Chapter 7

Purchasing a condominium

Only a decade old, condominium housing is a relatively new concept in Ontario. Because people are generally unfamiliar with condominium ownership, few purchasers have understood fully what it is all about until they have bought their own unit. It should come as a shock to no one that misunderstandings and difficulties have arisen.

At several of the hearings, the participants were asked whether they had seen copies of the Ontario Government's booklets called "Buying a Condominium" and "Living in a Condominium." Although a number of them had seen the booklets before buying, many had not seen them until after they had signed agreements of purchase and sale, and some had not seen them at all.

These booklets were prepared to inform condominium buyers of the matters they should be aware of before signing an agreement of purchase and sale. They are available upon request from the Communications Branch of the Ministry of Consumer and Commercial Relations, 555 Yonge Street, Toronto.

Because a prospective purchaser's first contact with condominiums is at the searching or buying level with sales representatives, we have chosen to begin our examination in the sales practices area.

Sales practices

Two major problems with those selling condominiums were reported to the Study Group. The first was the lack of knowledge exhibited by some sales people as to what a condominium actually is and how it works. The second was their virtually universal use of high-pressure sales techniques.

Although many complaints were levelled against persons selling condominium units, it became obvious that part of the problem facing condominium buyers stemmed from their inexperience in the housing market in general.

Whenever questions arose regarding sales representatives' techniques, the problem of buyers' expectations after seeing a model suite was also raised. Many purchasers commented that the model suites they were shown bore no relationship to the unit they purchased. Many of the buyers were surprised that they were not receiving the same finishes as in the model suites, and most blamed the sales people for not telling them that the model suite did not accurately represent, at least with respect to finishing touches, what would actually be purchased.

It was suggested that sales agents who are employed by developers be licensed. The licensing of sales people, however, is not really the type of assistance purchasers need when buying condominium units, as licensing does not necessarily improve the quality of personnel in any particular field, but only gives them an appearance of legitimacy.

The emphasis must be placed on attempting to educate not only the sales personnel, but, more important, the purchasers. High pressure sales techniques are not effective when applied to a fully informed consumer.

Recommendation No. 40:

The Ontario government provide assistance to consumer groups and the development industry in formulating courses to educate both sales personnel and consumers in the field of condominiums.

Individuals who sell condominiums for a developer may be either registered real estate agents or employees of the developer. A purchaser may not know which type the sales representative is; however, the controls over each vary.

The registered agent is licensed under The Real Estate and Business Brokers Act. The developer's employee, however, is not governed by any specific legislation.

From preliminary inquiries it has been determined that there are provisions available to control the problem of misrepresentations made by sales personnel of both types.

Section 24 of The Real Estate and Business Brokers Act entitles the Registrar to receive and investigate complaints concerning registered agents and brokers. Complaints concerning misrepresentation are not uncommon, but the Registrar of the Commercial Registration Appeal Tribunal has never suspended an agent's or broker's license for reasons of misrepresentation.

Recommendation No. 41:

The Registrar of The Commercial Registration Appeal Tribunal take more vigorous action in enforcing the provisions of The Real Estate and Business Brokers Act.

Section 36 (1) of The Combines Investigation Act, a federal statute, makes it an offence to make a representation which is false or misleading in a material respect. This provision applies to both oral and written statements and applies to all sales people.

This section is relatively new, yet under it, a developer has already been prosecuted. The developer in this case had advertised six acres of playground and parkland (which the judge found was probably untrue and at least deceptive) and \$2,000 government rebates to first-time homebuyers (yet only 85 of the 328 units actually qualified). The judge found that the ads placed by W. B. Sullivan Construction Ltd. were "blatantly misleading" and he imposed a \$12,000 fine.

Documents to be seen by purchaser

The buying of a condominium unit is more complex than the buying of a single family residential unit mainly because of the documents which govern the condominium lifestyle.

The Condominium Act requires that a purchaser of a condominium unit from a developer receive copies of the declaration, parts of the description, the by-laws, the rules and regulations, the management agreement, the statement of recreational amenities and the budget statement for the first year after registration. The Act provides that if the above-named documents are not provided to the purchaser any agreement of purchase and sale entered into by the purchaser is not binding on the purchaser.

The documents should be explained at this stage:

The Declaration: is equivalent to the written constitution of the condominium corporation. It sets the boundaries of the units, the ownership interest of the units and the percentage basis on which owners contribute to the common expenses. Since the items in the declaration determine how much of the common elements a person owns and on what basis contributions to common expenses are made, it can only be amended by consent of 100% of the unit owners and encumbrancers (Section 3) or pursuant to Section 3(b).

The Description: is the pictorial explanation of those parts of the declaration dealing with the boundaries of units, exclusive use common elements and common elements. It reflects what is written in the declaration (Section 4).

The By-laws: deal with matters of lesser importance than those in the Declaration, such as the holding of meetings, election of officers, maintenance of the property, collection of common expenses, and so on. Since these matters need not be fixed for all time they can be amended by a vote in favour of 66 2/3 per cent of the ownership interests (Section 10).

The Rules and Regulations: deal with matters respecting the common elements to prevent unreasonable interference with the use and enjoyment of the units and common elements. Rules and Regulations can only be made if a provision to do so is included in the by-laws. The Rules and Regulations can be amended by a vote of members who together won a majority of the units (Section 11).

The Management Agreement: is an agreement initially entered into between the builder, on behalf of the condominium corporation, and a management firm. It details the services to be provided by the management company and the cost of these services to the condominium corporation (Section 24b).

The Insurance Trust Agreement: is an agreement entered into by the builder on behalf of the condominium corporation, usually with a trust company, which provides for distribution of insurance proceeds when there is a claim (Section 24b).

The Statement of Recreational Amenities: sets out all the amenities which the developer intends to provide to the condominium corporation, such as recreational facilities, parks, laundry facilities, commercial space, superintendent's suite, etc. It also tells the purchaser whether the corporation will own the amenities outright, whether they are leased or whether ownership and costs are shared (Section 24b).

The Budget Statement: details the estimated expenditures for the first year after the date of registration. It should describe what services the corporation will receive and the frequency of service as well as the cost of each service (Section 24b).

Budget statements

As stated above, The Condominium Act requires a developer to provide each owner with a budget statement, which the developer guarantees until the end of the first year after registration. The purpose of Section 24b dealing with disclosure was to ensure that a purchaser had an opportunity to review the documents governing the condominium corporation before he executed an agreement to buy. Unfortunately, this has not been effective in practice (see chapter on Registrar).

The requirement has resulted in several serious difficulties. First, many developers have been contracting out of paying their full share of common expenses. They have done so by entering into agreements with purchasers which allow all the corporation's common expenses for the first year to be paid by the developer, with the owners paying a monthly contribution to the developer. By this method the developers have been able to leave condominium corporations with a zero balance at the end of the first year after registration. If the developer collects more than he is required to pay at the end of the first year, by the agreement, his position is that he is entitled to the surplus. If he collects less than what is budgeted, he makes up the difference.

There is a recent County Court decision in the unreported case of York Condominium Corporation #214 and Freg Developments Limited, in which an agreement providing for fixed payments to cover common expenses, leaving no debits or credits to the unit owners, was held to be valid.

This type of agreement is contrary to the intention of The Condominium Act, which states that each owner shall pay his proportionate share of the common expenses. It is also of concern that too many condominium corporations are starting out without adequate funds to continue operating into their second year (See chapter on Financial Administration).

Second, due to the length of time required to register a condominium in Ontario and a requirement that a budget statement be delivered to a purchaser before he executes the offer of purchase and sale, many developers are being forced to make up deficiencies in common expenses due to increases in hydro and other utilities over which they have no control and cannot accurately predict that far in advance.

Unrealistic budget statements, due to low-balling, have also been a problem.

Low-balling is a term used to describe a situation where a developer deliberately underestimates a cost to purchasers, in this case the monthly contribution to common expenses. This is sometimes done to induce purchasers into believing that the common expense payments are very low. Often, common expense payments increase dramatically in the second year after registration.

The 1975 amendment to The Condominium Act was an attempt to cure the problem of low-balling common expenses by requiring developers to guarantee common expenses for the first year after registration.

The amendment has not really resolved the problem; a few developers are still low-balling but by a different method. It is true that they guarantee the first year common expenses, but they build the cost of doing this into the price of the units. The unit owners see relatively low common expenses, with any excesses guaranteed by the developer. Frequently it is not until a year or two later that they realize for the first time what the actual costs are. By that time, they find that the common expenses are increasing; in some instances that were brought to our attention, increases were more than 100 per cent.

Although few in number, unscrupulous developers can do great damage to purchasers who buy condominiums that they cannot afford. Affluent or not, however, many unit owners discover what the true costs of running a corporation are only when the developer is no longer there to guarantee the expenses beyond the first year after registration.

Recommendation No. 42:

The Condominium Act be amended to provide that:

A. Budget statements supplied to purchasers be dated so that purchasers will know that the costs shown are estimated as of a particular date. Budget statements must also include the type, frequency and level of service to be provided.

B) Increases in hydro, heating fuel and other utilities, not including cable TV, not be required to be guaranteed by developers for the first year after registration, as these are costs over which the developer has no control. (see chapter on Municipal Services.)

C. A corporation be provided with a civil cause of action where a budget statement supplied by a developer proves to be unrealistic.

The Study Group's recommendation that all condominium corporations of more than 9 units be required to have annual audited financial statements will further ensure compliance with the above recommendation (see chapter on Financial Administration).

Offer of purchase and sale

As with any contract, it is most important that the parties involved seek the assistance of those persons with the training to best handle the complex yet necessary matters. When buying a condominium unit, the purchaser should always see his lawyer before signing the agreement of purchase and sale.

Most buyers are unaware that the fee they pay a lawyer includes the time the lawyer spends in reviewing and, where necessary, preparing an agreement of purchase and sale. Most buyers are also unaware that once they sign an agreement of purchase and sale and the agreement is signed by the developer, they have a binding contract; the lawyer they eventually see cannot assist them in altering the terms of that agreement, nor, as a rule, can the lawyer assist the purchaser in rescinding the agreement.

It is surprising that many condominium buyers move into their units without knowing that occupancy rent will be payable until after registration and that if the mortgagee so provides he may exercise the unit owner's right to vote. Complaints directed towards the legal profession's lack of condominium knowledge were often levelled in situations where the purchaser signed the agreement and then consulted the lawyer, or where the lawyer representing the purchaser was recommended by the developer.

Since the agreement of purchase and sale governs the conduct of the buyer and the seller until title is transferred, purchasers should not sign such agreements until they are fully aware of the documents which will govern their lifestyle and until they have a solicitor who has no conflict of interest.

Protection of purchaser's money

When a purchaser signs an agreement of purchase and sale, he will, as a rule, make a deposit payable to the builder. He will also have agreed to pay the remainder of the cash owing on account of the agreement of purchase and sale to the builder at the time he takes occupancy. At present, The Condominium Act provides that the money paid by a purchaser to a builder on account of the purchase price must be held in trust until its disposition to the person entitled to it or until delivery of the prescribed security.

This requirement in The Condominium Act was effected in 1975 to protect the funds of purchasers who took occupancy of their units and paid over their cash before receiving legal title.

It is not a serious problem where a buyer enters into an agreement of purchase and sale after the corporation is registered, and the developer is in a position to give title. After registration, the transaction, in terms of money changing hands, will be equivalent to a normal house transaction where the purchaser pays over his money and he receives a registered deed.

Because most purchases occur prior to the builder being able to give title, there is concern about the developer's ability to withdraw the purchaser's money from the trust account before he has given the purchaser title to his unit.

In a normal condominium transaction, where the agreement of purchase and sale is entered into before registration, the purchaser will pay his deposit at the time the agreement is entered into. He will pay his downpayment (either cash to the amount of the mortgage to be assumed, or all cash) when he takes occupancy.

First purchase deposit security

Under the Act, there is a method by which the developer may use the deposit money if he has given the purchaser a prescribed security.

The most common form of prescribed security acceptable under The Condominium Act is the HUDAC deposit receipt. At present, it provides coverage for loss of a deposit and down payment paid towards the purchase price of a condominium unit up to \$20,000 per unit. Any money paid by a purchaser in excess of \$20,000 is, under The Condominium Act, required to be held in trust by the developer or anyone receiving money on his behalf.

A new by-law passed by the HUDAC New Home Warranty Program provides that on any agreement of purchase and sale after November 1, 1977, there will be no ceiling on the liability of the warranty corporation for lost deposits and down payments.

Therefore, if a purchaser enters into an agreement of purchase and sale on November 2, 1977, pays \$40,000 in cash towards the purchase price of his unit, and later is entitled to the return of his deposit and down payment, he will receive a refund of his full \$40,000 as opposed to \$20,000 under the scheme prior to November 1, 1977.

Once this plan becomes effective, all previously unoccupied condominium units, for which agreements of purchase and sale are entered into after November 1, 1977, will automatically have this coverage. However, conversion units are not covered by the HUDAC New Home Warranty Program; therefore, alternative arrangements must be made for dealing with funds paid towards the purchase of these units.

Since the HUDAC New Home Warranty Program does not apply in the case of a conversion from a rental building, or where the purchasers have signed agreements of purchase and sale prior to November 1, 1977, but have not yet received their deeds, to deposits in excess of \$20,000, an amendment to the Act is required to assist consumers.

Recommendation No. 43:

The Condominium Act be amended to provide that in any transaction where the purchaser does not receive prescribed security under the Act, all cash paid via deposit or down payment towards the purchase price of a unit not be payable to the developer. The Act should provide that these monies are to be made payable to the developer's solicitor to be held in trust.

A similar problem arises with that portion of the downpayment resulting from the purchaser paying an amount to reduce the principal outstanding on the mortgage on the title to the unit.

Although the purchaser has paid money to the builder, the lender is not obligated to honour that payment unless the lender receives the money. Where the builder does not pay the money to the lender, then the purchaser may find himself having paid all cash for his unit or of having paid a substantial sum to reduce the mortgage, yet having the full mortgage outstanding against the unit.

While the HUDAC New Home Warranty Program may cover the full amount of such loss if the agreement of purchase and sale is entered into after November 1, 1977, the warranty does not cover more than \$20,000 of the loss if it occurred as a result of a purchase agreement entered into between January 1, 1977 and November 1, 1977, and does not apply at all to the sale of a previously-occupied unit, i.e., a conversion from rental.

Recommendation No. 44:

The Condominium Act be amended to provide that the agreement of purchase and sale include a provision that, where it is necessary for the vendor to reduce the mortgage committed to a unit, the purchaser need not deliver to the vendor that portion of the downpayment attributable to such reduction until the purchaser has received evidence of the reduction.

Some people have interpreted the statute to permit the developer to remove the funds from trust once the corporation is registered. However, the purchaser could be severely prejudiced if for some reason the developer were unable to give title to the unit, and had already utilized the purchaser's cash.

A builder should not be entitled to remove the funds from trust upon the corporation's registration, as Section 24(3) provides that a developer must pay interest on this money until a deed acceptable for registration is given to the purchaser. Section 24c(3), together with the intention to protect purchaser's monies, leads us to suggest that this point be clarified.

Recommendation No. 45:

The Condominium Act be amended to provide that the money paid by a purchaser on account of the purchase price of a condominium unit (excluding occupancy payments and money for which the prescribed security has been given) be held in trust until a deed in a registerable form has been given to the purchaser in accordance with the agreement of purchase and sale.

Waiving consumer protection provisions

It is normal practice in legislative drafting to specifically prohibit the contracting out of individual statutory provisions. An example of an exception is The Consumer Protection Act, R.S.O. 1970 c. 32, which provides in Section 44 that, "This Act applies notwithstanding any agreement or waiver to the contrary." This provision applies to the entire statute.

The Condominium Act, as it changes to meet consumer needs, is gradually evolving into consumer protection legislation. Some of the provisions currently included in the statute are proving ineffective in daily operation because of uncertainty over whether one can contract out of them.

The most predominant example of this is where developers include provisions in agreements of purchase and sale whereby the purchasers agree to waive the interest payable to them under Section 24c(2) and (3). Because the amount of interest involved is not usually a significant figure, no purchasers have tested the validity of this waiver agreement.

Purchasers should not be required to go to court over this issue. It is our opinion that the Legislature intended this, and other consumer protection sections of the legislation, to be mandatory so that all consumers would benefit from them.

Recommendation No. 46:

The Condominium Act be amended to include a general provision that the Act will apply, notwithstanding any agreement or waiver to the contrary.

Cooling-off period

As stated earlier the purchase of a condominium dwelling is far more complex than that of a single family home. Subsections 1 and 2 of Section 24b of The Condominium Act provide for disclosure of documents so that purchasers are aware of what they are buying.

These subsections require the developer to provide a purchaser with a copy of the declaration, certain parts of the description, a statement of recreational or other amenities, by-laws, rules and regulations, management agreement, insurance trust agreement and a budget statement. These documents, if provided to a purchaser before he executes an agreement of purchase and sale, should inform him properly of the matters that will affect his lifestyle in the condominium community.

Once the agreement of purchase and sale has been executed, the purchaser cannot normally rescind the agreement, nor can he have his lawyer amend the agreement to secure more favourable terms. Unless the documents are provided to a purchaser and the purchaser is given an opportunity to review them before signing or rescinding the agreement after he has had an opportunity to review them, the disclosure requirements will not serve their intended purpose.

Recommendation No. 47:

The Condominium Act be amended to provide that:

A. The purchaser of a residential unit have the right to rescind a purchase agreement, without incurring any liability for breach thereof, within 10 days from the later of the date the purchase agreement is executed or from his receipt of all the documents which the developer is required to provide.

B. A purchaser not have the right to rescind the purchase agreement if 10 clear days prior to the execution of the agreement he received all the documents the developer is required to provide. (see chapter on Registrar).

Adjustments

In the usual agreement of purchase and sale of a condominium unit there is a clause dealing with those items which are to be apportioned between the vendor and the purchaser. For example, if the purchaser agrees to take occupancy of his unit on the 15th of the month, the vendor will be responsible for those expenses up to the 15th, and the purchaser for those expenses from the 16th to the end of the month. These are referred to as adjustments.

It is usual that upon occupancy, closing adjustments are made on taxes, corporation insurance premiums (only adjusted on sale between developer and first purchaser), common expense contributions, and lump sum payments to the reserve fund.

There is concern about adjustments being made for common expenses and reserve funds which are properly payable only to the condominium corporation. Since these items may be adjusted on the occupancy closing and since there is no condominium corporation in existence before registration, the purchaser must make this payment to the developer. It is probable that the developer will have provided in the agreement that he will turn this money over to the corporation. There is, however, no guarantee to this effect. If a developer encounters financial difficulty, the purchasers may find these funds have been dissipated. It would therefore be better if the reserve fund were adjusted on final closing to ensure that the funds remain available to the purchasers.

Recommendation No. 48:

The Condominium Act be amended to provide that the portion of the adjustments to cover reserve funds or common expenses be payable directly to the condominium corporation.

In addition to the foregoing adjustments on closing, adjustments are also made on the mortgage, and these require some explanation. When the builder and purchaser estimate the adjustments, the builder requires the purchaser to pay interest from the date of closing to the interest adjustment date, the date being set out in the mortgage or assumption agreement, on the full amount of the mortgage, although the mortgage has not been fully advanced at the time of closing.

The builder will pay interest on the money advanced to the lender and will keep the remaining interest. He does so on the grounds that having delivered possession of the unit to the purchaser, the builder is subsidizing the purchaser for money the builder has not received; therefore, he is entitled to interest.

The builder also collects interest on the unadvanced portion of the mortgage from the interest adjustment date in the mortgage to the estimated date of the final advance. This is because the builder is attempting to counteract any deduction for accrued interest by the lender from the final advance.

The purchaser makes full payments to the lender of interest on the mortgage as if the mortgage were fully advanced from the interest adjustment date in the mortgage. Thus, the purchaser should be certain to readjust the interest held by the builder after the final advance and to obtain a mortgage statement from the lender. This statement should show that any interest paid to the lender which was not earned by him because the money was not advanced, is credited to the mortgage principal.

A subsequent credit to the mortgage principal will, of course, affect any amortization schedule obtained by the purchaser showing the amount of principal and interest in each mortgage payment.

Provisions in agreements of purchase and sale

The agreement of purchase and sale usually contains a number of standard provisions:

- Completion of the unit means that work on it has finished and services and access to the unit make it habitable.
- Common element items, such as landscaping, need not be completed prior to the purchaser moving in.
- Before moving in, the purchaser will inspect the unit and accept it subject only to the deficiencies noted at the time.
- The unit deficiencies will be fixed, if possible, by the builder before the purchaser moves in.
- If the unit is completed prior to registration of the condominium, then the purchaser must move in and occupy the unit as a tenant until the condominium is registered and ownership can be given to the purchaser.

On moving in, the purchaser pays to the builder the downpayment and estimated amounts sufficient to pay the purchaser's share of insurance, taxes and such utilities as are billed to the unit. For example, the builder may estimate that he will have paid a portion of the municipal taxes in advance by the time a deed is given to the purchaser, and that the purchaser should pay to the builder that portion of the taxes that covers the time in which the purchaser will be the owner. These amounts are to be readjusted when the purchaser receives title to his unit and the builder's and purchaser's respective shares of these costs can be accurately determined.

During interim occupancy, i.e., before the purchaser takes title, the purchaser is to make monthly payments of rent as a fee for occupying the unit. These payments are usually not credited to the purchase price. The purchaser, during interim occupancy, is to govern himself as much as possible by the draft rules and regulations provided him and which will be the ones passed by the condominium corporation when it is created.

Some time after registration the purchaser will receive title to the unit from the builder, the rent for the final month occupancy will be adjusted so that the purchaser does not pay rent for the time he is the owner, and the money paid on the interim closing will be readjusted.

Occupancy rent

The interim occupancy arrangements provide the builder with rental income, which can help offset his mortgage interest charges and maintenance costs. This reduction in the builder's net carrying costs means that the initial purchase price can be less than if the builder has to include all these costs in his sale price. The builder requires the

downpayment and adjustment money to be paid when the purchaser goes into occupancy so that if a dispute arises when the deed is given, the purchaser cannot hold up payment of the money while retaining possession of the unit. However, the consequences of the occupancy arrangements are complex and sometimes unsatisfactory to the purchaser.

In the first years of condominium sales, some purchasers claimed they did not understand that the monthly fee they were required to pay during interim occupancy was merely rent. The Condominium Act was accordingly amended to provide that if money paid was to be only rent, then the agreement of purchase and sale must state that the money will not be credited to the purchase price.

The new provision merely created a hazard for the unwary builder; no matter how clear the provision for rental payments, if there was no provision that the money would not be credited to the purchase price, the money would be so credited and the purchaser received occupancy rent-free.

Recommendation No. 49:

The Condominium Act be amended to delete the requirement that the agreement of purchase and sale specify that rent money not be credited to the purchase price and the matter be left to the disclosure statement.

Today, a common complaint heard from purchasers regards the fact that principal is not reduced during the interim occupancy period. Some purchasers believe that the rent paid is wasted money and that they would rather be reducing their mortgage principal.

There are several reasons why the payment of mortgage principal during the interim occupancy period would be inadvisable. First, the lender's security during the period is the entire building (see chapter on Lending Institutions). Until registration as a condominium, the lender has no ability to separate the mortgage security by unit; therefore, the purchaser would have no protection for his payments in the event of a default by the builder on the construction mortgage.

Also, the amount of principal which could be paid off on each mortgage would be minimal and would not warrant the administrative costs of a special collection and recording where the purchaser is not yet the owner or the property divided into units.

The amount of the rental payment also poses problems. In a good market, the builder often sets the rental payment at what the sum of principal, interest, tax payments and common expenses would be if the condominium were registered and the purchaser were an owner assuming the full mortgage registered on the unit. Some builders charge a little more and some a little less. The lesser amount might be calculated so as to reduce the rent

by the average amount of principal payments on the mortgage which are not being paid. The amount of rent charged is based on what the market will bear. A normal market for a condominium project permits interim occupancy payments (and indeed the principal, interest, taxes and common expenses after registration) to be from 15 to 20 percent more than the rent for an equivalent rental building.

In a poor market, the purchaser is in a better bargaining position because of the vendor's desire to sell the unit. In the agreement, the rental payment may be reduced to what the unit could be rented for if the building were a rental building or where the purchaser has made a large downpayment, the rental could be reduced to the amount the purchaser would be paying in monthly fees after title is obtained.

It is important for the purchaser to understand that the rental amount is fixed between the purchaser and the builder by the agreement of purchase and sale. All discussions must take place prior to signing the agreement, and the rental amount is one of the factors in the decision of whether or not to purchase. There is no use complaining about the rent after the agreement is signed.

The purchaser of a condominium unit who takes occupancy before registration should be aware that control of the condominium corporation does not automatically pass to the purchasers. Where title has not been conveyed to the purchasers, and there is no corporation in existence, the developer retains complete control over the project.

After registration, the developer conveys title to the individual unit purchasers but retains operating control by having his representatives on the Board of Directors. Once a developer has conveyed title to 50 per cent of the units, Section 9b(1) of The Condominium Act requires that the developer's board call a meeting to elect a new Board of Directors, and at that meeting purchasers who have received title may vote.

Occupancy status

When the concept of allowing a purchaser to take possession prior to his receipt of a deed was introduced, lawyers had many discussions as to the purchaser's status during the period prior to him becoming an owner. Some lawyers thought that the purchaser just had a licence under the agreement of purchase to enter the property. Other lawyers speculated that the purchaser was really a tenant under The Landlord and Tenant Act.

The introduction of The Residential Premises Rent Review Act, controlling rent increases, and the amendments to The Landlord and Tenant Act guaranteeing a tenant's right to the rented premises made it important that the status of the purchaser be decided.

The general opinion that the purchaser was a tenant was confirmed in a series of cases arising out of The Residential Premises Rent Review Act, but, this status is not without problems. As some tenants' rights are different from the rights of unit owners, the differences could cause confusion.

There are numerous rights and obligations of tenants that bear directly on the interim occupancy problem. First, a landlord may not require or receive a security deposit. As defined in The Landlord and Tenant Act, this is a deposit for the performance of an obligation or the payment of a liability of the tenant or to be returned upon the happening of a condition. It may be that money taken by the builder to secure the amount on closing falls into this definition. A consequence of tenancy status may be that the purchaser's downpayment or adjustments should not be paid, prior to the purchaser receiving his deed.

Second, no landlord may seize the personal property of a tenant just because rent is not paid.

Third, the landlord's agreement to provide heat and other utilities is interdependent with the tenant's obligation to pay rent. So, a tenant can withhold rent if the landlord does not deliver what he is required to under the lease. A unit owner, however, has no right to withhold common expenses just because of the failure of the condominium corporation to perform its duties.

Fourth, a tenant has the right to assign and sublet his lease. The landlord may require that his consent be given, but the consent must not be arbitrarily or unreasonably withheld. This conflicts with the interest of a condominium builder who may have a mortgage advance due to him based on the purchase and occupancy of a unit by a lender-approved purchaser. The builder may therefore wish to prevent an assignment or subletting. It is uncertain whether a refusal to consent to an assignment or subletting on the grounds of interruption of mortgage advances is reasonable.

Fifth, except in an emergency or in showing premises to future tenants after receiving notice that a tenant is leaving, the landlord must give 24 hours written notice or get permission from the tenant to enter his unit. A condominium corporation, or any person authorized by it, however, may enter any unit at any reasonable time to perform the objects and duties of the corporation.

Sixth, the landlord is responsible for providing and maintaining the premises in a good state of repair and for complying with health and safety standards. The tenant is responsible for ordinary cleanliness and for repair of damage caused by his wilful or negligent conduct. In a condominium, the declaration may make either the corporation or the unit owner responsible for maintenance and repair of a unit or for maintenance of the common elements. The matter of maintenance in the unit is particularly important where unit purchasers make substantial changes in their units in anticipation of becoming owners.

Most builders attempt to maintain at least minimum levels of cleanliness and care during the period in which units are being sold. But, when all the units are sold there is little incentive, except to maintain their reputation in the hope of gaining a management contract with the condominium corporation after registration. Part of the problem in property management lies in the fact that units may be sold and occupied after completion so that at any one time, there may be a number of units vacant. Where the occupied units are scattered, the cost of maintenance may not be covered by the rental return to the builder.

At the same time, construction is being carried on so that many of the smaller builders, or those without management capability, prefer to use their construction staff for much of the early maintenance. The failure to provide professional property management allows early deterioration to set in because of improper maintenance and the lack of an effective preventative maintenance program.

Seventh, a landlord may not withhold reasonable supply of any vital service, such as heat, fuel, electricity, gas, or water, which it is his obligation to supply under the tenancy agreement. In a condominium, the agreement of purchase and sale rarely states what the developer is to provide during the interim occupancy period. The purchaser must look at the condominium documents to determine what the condominium corporation is to provide. From these documents the purchaser can determine those services which the developer should provide during interim occupancy.

Eighth, there are extensive provisions with relation to the termination of a lease in The Landlord and Tenant Act, and to the landlord's right to possession of the property. The Landlord and Tenant Act has already been amended to state that where a tenancy arises by virtue of an agreement of purchase and sale of a condominium unit and the agreement is terminated, the right of a tenant to remain in the premises does not apply. In the event of vandalism or failure to pay rent, condominium builders have utilized these provisions to remove purchasers in possession under their agreements of purchase and sale.

Recommendation No. 50:

A. Purchasers in possession under an interim occupancy arrangement remain as tenants under The Landlord and Tenant Act, but that certain changes be made in their rights.

B. The Condominium Act be amended to provide that, notwithstanding the status as tenants of purchasers in possession:

- a) The builder be required to provide only those services that the condominium corporation is to provide in accordance with the documents the builder must provide purchasers.*
- b) The responsibility of the builder for repair and maintenance of the building be that of the future condominium corporation.*
- c) The builder have the same right of entry as the future condominium corporation.*
- d) The builder be allowed to withhold consent to an assignment of the interim occupancy agreement or to a subletting where this would interrupt the flow of mortgage advances.*

Builder's solicitors should be advised that as a consequence of this tenancy status, purchasers in possession should not be required to pay estimated adjustments on occupancy, but only upon title passing.

Enforcement of rules

It is desirable that the purchaser's rights during interim occupancy be consistent with their subsequent rights as owners. If the developer fails to enforce the rules from the beginning, many purchasers form bad habits, at the expense or discomfort of the other purchasers, which are difficult to correct.

The agreement of purchase and sale often requires the purchaser to abide by the rules given the purchaser and which will be passed by the condominium corporation.

There is, however, little to ensure that the same rules are enforced against other purchasers before registration of the condominium. The right of the purchaser to enforce the rules against any owner who, for example, has a noisy pet or air-conditioner, is in The Condominium Act for use after registration under that act.

Many purchasers have found themselves waiting in frustration for registration because the builder did not bother to enforce the rules against the other purchasers during the interim occupancy period.

Recommendation No. 51:

The Condominium Act be amended to provide that the purchaser and the developer abide by the rules and regulations proposed for the corporation and that such rules be enforceable by the purchaser against other building occupants just as if the rules were rules of a registered condominium corporation.

The response of purchasers to problems in many unregistered condominium projects is to establish an interim homeowners' association to unify and communicate purchaser response to the builder. Sometimes, an association is created as a reaction to particular problems. Some builders appreciate this feedback of information from purchasers at an early stage and encourage such organizations by providing meeting rooms and printing facilities so that they get in the habit of making decisions and selecting representatives. A few representatives often become candidates for the first board of directors elected by the purchasers after the condominium is registered.

Such associations should be encouraged because communication and education at any early stage will result in stronger leadership once the developer's involvement in the project is reduced.

Occasions have developed, however, in which different directors were selected after registration and for reasons which remain obscure, the homeowner's association continued operating to keep an eye on the board elected by the purchasers. The existence of an elected board of directors and a "watchdog" committee from the association creates tension and interference in the normal running of the condominium corporation.

The value of an association lies entirely before the directors are elected by the purchasers; it is primarily in the area of training people to become future board members.

Activities of an association include analysing financial information, construction quality, and the maintenance standards necessary for proper running of the building, and developing social activities that encourage purchaser participation in the building community.

A major difficulty in developing such activities is an insufficient budget to retain outside help such as lawyers and engineers to aid in analysing management and construction quality; social activities are often self-supporting. It is only when the condominium is registered and a board of directors is elected that there is sufficient cash flow for this external aid.

Reliance during the pre-election period must be placed on money obtained from voluntary contributions or in expertise provided by other condominium corporations. This expertise is often available through regional condominium associations. Several of these associations made presentations to the Study Group and showed capability in assembling and organizing data on complex questions.

Recommendation No. 52:

Condominium purchasers in a particular project join together to create an interim association. This association should then select an individual whom the developer could include on his board of directors immediately upon registration. The developer should include at least one purchaser-occupier on the board of directors as soon as possible after the registration of the corporation.

Delays in registration

The lack of payment towards the mortgage principal, inability to control abuses of the documentation, uneven management, and lack of outside aid encourages criticism of the lengthy registration process. This criticism is compounded by a suspicion that the builder is deliberately delaying the process in order to make money on the building rental.

At public hearings, some purchasers expressed suspicion that builders profited from delay where the building had not been assessed for municipal taxes as occupied, where the construction mortgage had not been fully advanced and corresponding interest charged by the lender to the builder, and where maintenance was poor or the building was half-empty (see chapter on Approval Process).

Suspicion of an incentive for the builder to delay was sufficient in 1974 for The Condominium Act to be amended to provide that every agreement of purchase and sale was deemed to contain an agreement by the vendor to take all reasonable steps to register the condominium.

Unfortunately, there was no definition of what were reasonable steps. In any case, court action by an individual purchaser was necessary to compel the builder to speed up the process. Builders possessing a mortgage commitment that required a certain percentage of sales to be made before the lender would consent to registration can say that having to comply with this provision was not reasonable.

As well, builders can involve themselves in a number of difficulties which would prevent registration, or at least seem plausible enough to discourage an application by a purchaser to the court. For example, a dispute with the municipality leading to a delay in the municipality sending its letter of approval of the condominium to the Minister of Housing might be one such delaying tactic.

Recommendation No. 53:

The Condominium Act be amended to provide that a notice of intent to register a condominium be registered when the building permit is issued and such notice be signed by all existing encumbrancers. (Those who have a financial or non-financial interest or claim on the property). These and all subsequent encumbrancers must be deemed to have consented to the registration of a condominium, conforming with the information filed with the Condominium Registrar (see chapters on Approval Process and Registrar).

This arrangement would replace the existing requirement that encumbrancers consent to registration of the condominium declaration.

Chapter 8

Property management

It was apparent from our hearings that a number of problems associated with condominium ownership originate with the method of management used in various developments. Proper management of a condominium corporation must be recognized as an essential part of the concept if it is to be successful. Good management can contribute much in overcoming the present fears and misconceptions that the public has about condominium living.

Management

Maintenance of the corporation's common elements and management of the corporation's assets represent the major areas of responsibility of the board of directors. The board must provide the initiative in: ensuring the property is maintained; establishing rules and regulations to govern the use of facilities; determining methods of enforcement; adopting a course of action on common expense arrears; supervising the accounts payable and accounts receivable; insuring proper bookkeeping records are maintained; preparing the budget; and responding to complaints from fellow owners. These are only a sample of the many tasks involved in providing good management.

There are several methods of management from which the board may choose. The choice will be influenced greatly by the design and number of units in the development and the quality and frequency of service desired. Most large corporations find that commercial management is a necessity, while many smaller corporations may not need such extensive assistance. The latter corporation may be fortunate in having a sufficient number of experienced resident-owners willing to provide the basic management functions if they are supplemented by selective professional assistance.

Boards of directors should be very sensitive to their management needs. A decision on a form of management, based solely on cost, may not necessarily be in the best interest of the owners. If proper management is sacrificed the development may deteriorate due to improper or insufficient maintenance. The temptation may be to allow selective repairs and maintenance to go unattended in order to realize lower maintenance charges. However, in the long run this practice results in early deterioration of facilities. Owners might appear to benefit initially by such activity but may have to spend excessive amounts of time and money later to repair or upgrade facilities which otherwise would have been adequately maintained.

A most important decision for the board of directors is determining the best management approach for their needs at a reasonable cost. The board might consider a variety of options ranging from total commercial management as one extreme and self-management as the other. Any major change in management procedure, particularly a move to self-management, should be discussed with the mortgagee. Failure to obtain the mortgagee's consent for a major change could result in the mortgagee's decision to exercise his right to vote.

The board's decision may be similar to one of the following options for management:

A. The corporation may employ a commercial management company to assume the entire maintenance and financial management responsibility using the firm's employees for maintenance duties.

B. A large corporation may wish to involve the services of a full-time on-site manager, a secretary-bookkeeper, and a management firm, all of whom are employed by the board.

C. The board may employ several companies or individuals through contracts for different maintenance responsibilities and supervise the quality of their work.

D. A smaller corporation may choose not to utilize the services of a commercial management firm, in which case experienced owner-residents may be involved in management roles and maintenance tasks may be assigned to various committees of the corporation.

The above sample options are only included to illustrate that various management packages may be considered. Additional management arrangements can be obtained and negotiated with commercial management firms. Sound management is vitally important to the harmony and successful evolution of condominium living.

Checking the experience of the condominium corporations listed by a property manager as references is one method of ensuring that sound management is obtained.

A carefully drawn management agreement should contain well-defined policy decisions by the board which should be communicated to the management firm when the contract is being negotiated.

A check list for property management

The items contained in this list are general in nature and may cover several points with which the management firm of a small or medium sized corporation would not be involved. Several participants at our hearings requested such a list to be used by new boards in examining proposals for management contracts.

1. The contract should state exactly the responsibilities of the management firm. Is it just to maintain the common elements? Does it apply to exclusive use common elements?

2. A maintenance and activity schedule should be considered and agreed upon. The maintenance schedule should include a specific preventative maintenance program for mechanical equipment. (Examine the sample developer's maintenance schedule included in Chart 5 for comparison).

Chart 5

Sample schedule of maintenance responsibilities *

Items	Sample schedule of maintenance responsibilities *				
	I	II	III	IV	V
	Common elements under corporation responsibility	Exclusive use common elements under corporation responsibility	Unit components under corporation responsibility	Certain other components under unit owner's responsibility with-out respect to ownership of the component	
Plumbing and related systems and components thereof.	All maintenance, repair and replacement of portions of plumbing constituting service to more than one unit. Water damage to common elements or units other than the one which is the primary source of the problem through negligence of the occupants of such unit.	If any, same as in Column II.	Only to the extent that a malfunction or threat of same has originated outside the unit in which the malfunction occurs or may occur.	All portions, including fixtures and appliances attached thereto. Water damage to a unit, when the primary source of such problem is through negligence of the occupants of that unit.	
Electrical and related systems and components thereof excluding appliances, fixtures and lights serving only one unit.	All, in all regards.	All, in all regards.	All: especially note that switches, wall sockets, circuit breakers and any other items which serve one unit but lie outside its legally defined boundaries are the corporation's responsibility.	—	
Heating and cooling systems and components thereof which serve the separate units.	—	—	—	All, in all regards.	
Parking spaces.	All surface parking spaces, in all regards.	Exclusive use common element parking spaces, in all regards.	—	—	
Refuse collection system.	All, in all regards.	—	—	—	
Grounds, including all landscaped and paved areas and other improvements thereon lying outside the main walls of the buildings.	All.	Paving, privacy fences, gates as a general common expense.	—	—	
Building, exterior roof, vertical walls, foundations.	All in all regards with certain exceptions expressed elsewhere herein regarding routine cleaning.	—	—	—	
Windows.	All which do not serve a Unit, in all regards.	—	In all regards except routine cleaning.	Routine cleaning.	

Doors, main entry to Units.	—	—	All surfaces exposed to corridor including door panel, buck, trim and sill.	Interior of door panel interior trim. Hardware set including lock and door chime assembly and hinges/closure.
Terrace doors.	—	—	In all regards except routine cleaning.	Routine cleaning.
Terraces.	—	In all regards except routine cleaning.	—	Routine cleaning.
Screens, terrace doors and windows.	All which do not serve a Unit, in all regards.	—	—	All in which serve the Unit in all respects. Replacements to be of same color, grade and style.

*From “Managing a Successful Condominium Association”, a report published jointly by the Urban Land Institute and the Community Associations Institute, based on a manuscript authored by the Community Management Corporation, Reston, Virginia.

Notes

Maintenance responsibilities:

This chart and the titles and headings used herein are not intended to describe or encompass all maintenance functions nor to delineate all respective responsibilities between the Unit Owners, severally, and the Corporation. The placement of responsibility under any specific column does not always accurately reflect the precise character and nature of ownership. The appropriate sections of the Declaration determine ownership.

Column I: **Items.** Items appearing in this column are illustrative and not exhaustive.

Column II: **Common elements under corporation responsibility.** Responsibility for determining and providing for the maintenance, repair and replacement requirements of the Common Elements and determining the costs thereof shall be primarily the responsibility of the Corporation and such designees to which it may delegate certain such responsibilities.

Column III: **Exclusive use common elements under corporation responsibility.** Responsibility for determining the maintenance, repair and replacement requirements of the Exclusive Use Common Elements shall be a shared responsibility between the Corporation and the Owner of a Unit to which a specific Exclusive Use Common Element is exclusively, apportioned, **provided, however,** that the Corporation shall have the final responsibility for determining the need for and accomplishing such maintenance, repair and replacement activities.

Column IV: **Unit components under corporation responsibility.** The items in this column are legally and by definition a part of a Unit but are attached or directly connected to or associated with the Common Elements and Common Expense items in such a way that a clear distinction between Unit Owner and Corporation responsibility cannot be made. Moreover, such items frequently involve matters of concern relative to the general health, safety and welfare of all of the occupants of the building. Thus, certain costs

which appear to benefit a single Unit Owner but which affect other Unit Owners are declared a Common Expense, especially when the correct functioning of an activity or element is integral to or supportive of the legally defined Common Elements and Common Expenses.

Column V: **Certain other components under Unit Owner's responsibility without respect to ownership of the component.** The items in this column are not intended to be exclusive and all-encompassing and do not affect responsibilities otherwise expressly provided for.

3. The agreement should specify how, when and by whom instructions are to be given to the firm or its representative. Generally, a specific board member is authorized to instruct the representative, with the exception of emergency situations when the property management representative assumes the responsibility.

4. The management functions should be differentiated and enumerated. The agreement should specify that the representative will make himself available at all reasonable times and for whatever periods are necessary to fulfill his management duties which may include attending board meetings, inspecting the property, supervising emergency repairs to the units and common elements, collecting common expense arrears, and hearing and disposing of complaints. This is particularly important if no resident staff is employed. The question of whether complaints by owners relative to common elements go to the board or directly to the agent should be answered in the agreement.

5. The terms of the agreement, the conditions for accelerating the termination of the agreement and the notice, if any, required for its renewal should be specified.

6. The agreement should specifically authorize the representative to spend funds. All funds should be spent in accordance with budgetary projections, and the firm's representative should do nothing which would be at a substantial variance from the budget without express board approval. The provision of signing authority for expenditures should also be included in the agreement. (See the chapter on Financial Administration.)

7. The contract should require disclosure by the firm or its representative of instances in which services or supplies are obtained from companies in which the firm or representative has a financial interest.

8. The agreement should cover the preparation of financial statements indicating their frequency and content.

9. The firm's duties and compensation in the event of a major destruction or termination are rarely included in management contracts. At the very least, the contract should provide that responsibilities arising from such contingencies shall be determined by the board, including the right to cancel the management agreement.

10. The firm must provide and file all forms made necessary by the employment of personnel, including unemployment insurance, Canada Pension Plan, and other requirements for permanent or temporary employees.

11. The agent should agree to maintain an inventory of all corporation property including furniture, gardening equipment and supplies, typewriters and any other such corporation property.

12. The agreement should include a statement of the terms for compensation.

13. The agreement should specify that the management company and its employees have adequate bonding and insurance coverage on their activities.

14. The agreement should allow for the suspension of the contract after a period of time deemed sufficient to test the performance of the management services.

15. If service employees engaged by the management firm are also to be employed directly by owners, it may be useful to fix the charges, availability of such employees, and priorities for internal unit work.

The list is not all inclusive, but is intended only as a guideline for some of the items which might be included in a management contract. (The above "Check List for Management Agreement" is substantially the same with some additions and deletions, as the "Check List for Condominium Management Agreement" published in *Condominium and Co-operatives* by David Clurman and Edna L. Hebard.)

Qualifications for condominium property management firms

Considering that society demands certain verifiable qualifications from almost anyone who provides a service to the public, it is most disconcerting that there is not even a minimum standard of training required for persons who are entrusted with the deposition of large sums of money and real estate on behalf of others. Condominium owners should have some assurance that the persons who administer their affairs have the experience required to protect their investment.

People in the condominium property management industry appear to realize that they have a responsibility to see that higher standards are developed and applied to all those offering condominium management services. This is encouraging in light of the changes that must be made.

We accept the fact that condominium property management is distinct, in many ways, from other forms of property management and as such requires specific training. Certainly, there must be a minimum standard of training for all persons engaged in property management.

A review of existing courses offered to those in the management field reveals a lack of agreement as to the necessary content. However, several different opportunities exist for those interested in property management. We have provided a general overview of some of the courses available:

1. *The Institute of Real Estate Management*
I.R.E.M., an American organization, offers courses to people active in building and property management.

The Institute offers a designation, Certified Property Manager (C.P.M.), which can be obtained without taking a specific course in condominium management. There are presently approximately 270 Certified Property Managers in Canada.

The specific course offered by I.R.E.M. on condominium management is of approximately one week duration, with an examination immediately following the lectures. Although the course manuals and examinations are based on U.S. legislation and practices, the lecturers used by the Greater Toronto Chapter are usually Canadian. Dependence on U.S. materials is not seen as detrimental by I.R.E.M. because the courses focus on the theory of property management rather than the institutional framework of real estate. It is the opinion of the Institute that their general program covers many of the essential aspects involved in condominium management. It is their philosophy that a properly trained Certified Property Manager is of invaluable assistance to all forms of property management needs. The Institute sponsored a seminar on the management of condominiums which was held in Toronto in June, 1977. The schedule for the seminar encompassed both lectures and assigned readings and the participants were assessed by means of an examination. As with all I.R.E.M. courses, the individuals who enrolled in the condominium seminar generally had several years of active experience as building and property managers before enrollment in the course.

2. Colleges of Applied Arts and Technology

George Brown College offers a two-year course in residential property management. The course generally attracts people who have work experience who wish to enter the field of property management. The course includes 64 hours of instruction devoted specifically to condominium management.

The Housing and Urban Development Association of Canada (HUDAC) and the Ontario Housing Corporation were involved in the establishment of the George Brown College course. The first graduates from that program were available in the spring of 1977.

Several other community colleges offer a variety of less intensive educational opportunity. Seneca College, Algonquin College, and Fanshaw College periodically offer week-end exchange sessions which deal with condominium management. While these sessions are most helpful to those interested in condominium property management, they cannot be compared to the courses offered by I.R.E.M. or George Brown College. However, we believe they could be expanded to provide additional depth and help fill the present lack of education programs. We compliment the community colleges for their assistance in the area of property management seminars.

3. The Institute of Housing Management

The Institute, founded in 1976 by Canadian property managers, is developing a 19-part home study program in property management which will include condominium management.

The Institute, which is co-operating with HUDAC in the preparation of course material, anticipates that the course will be offered through colleges of applied arts and technology in 1978.

The courses cover a variety of topics relating to condominium property management. A review of the course content reveals that the following topics are included in most of the courses: condominium documents; budget preparation; management contracts; condominium legislation; maintenance schedules; emergency procedures; and insurance trust agreements.

Condominium boards of directors interested in obtaining commercial management should recognize that the management of condominiums is only one facet of property management. When they are considering employment of a manager or management firm, they should verify the property management credentials of the applicant. The boards should be concerned with the formal training the applicant has obtained. In the past, opportunities for education in condominium management have been limited. However, the range of courses now available or soon to be presented — seminars through I.R.E.M., extension courses through I.H.M. and the course at George Brown College — are extensive.

Recommendation No. 54:

The Registrar of Condominiums assist the condominium property management industry in determining the proper content and duration for a prescribed course or choice of courses in the field of condominium property management.

The adopted course content should be reviewed for input with the regional condominium associations prior to preparation in order to ensure general acceptance and co-operation.

Code of ethics

In addition to improving the qualifications of management firms, there is a need for professional standards within the industry. There is particular concern that the principals of any management company or any person acting on behalf of them in a management capacity should provide a declaration of involvement in any business interests they may have which could be construed as inter-related or conflicting with the condominium project. There is great concern that conflict of interest situations should not be permitted.

We applaud the efforts of the newly formed Institute of Condominium Managers of Ontario which has begun to work on a proposed code of ethics to cover the following: "standards of professional conduct; standards of advertising; trust fund administration; arms length contract of business; disclosure of interests; tendering practices; fair competitive practices; adherence to educational standards; no encouragement to breach of contract".

Recommendation No. 55:

A. A code of ethics be established by representatives from the property management industry and condominium associations, in conjunction with the Registrar of Condominiums.

B. Such guidelines apply to all firms offering commercial condominium management services in the Province of Ontario.

Registration of management companies

Two alternatives exist for the regulation and discipline of property management companies: self-regulation by the industry or compulsory licensing by the province. We have serious reservations about the effectiveness of provincial licensing and discipline of management companies. If the industry is serious about moving towards the establishment of higher standards, we would encourage them to take immediate action to organize their industry as a self-governing and self-disciplining body and suggest that the provincial government enact the necessary legislation granting the authority for regulation and discipline. Such a move could effectively remedy many of the concerns expressed and this initiative would be preferable to registration being imposed on the management firms by the government.

Recommendation No. 56:

Representatives of the property management industry in conjunction with the Registrar of Condominiums work to prepare legislation to enable the property management industry to become a self-regulating and self-disciplining body.

This alternative would be more desirable and result in greater protection to owners and greater involvement by the management firms. However, if this development does not appear possible in the very near future, the Ministry of Consumer and Commercial Relations should proceed with registration of management firms.

Recommendation No. 57:

In the absence of action taken by the property management industry towards self-regulation, The Condominium Act be amended to require that all individuals and companies engaged in condominium property management for a fee be registered with the Registrar of Condominiums.

Chapter 9

Property taxation

Origin of the problem

Currently residential condominium units are assessed at the same proportion of market value as single-family residential property generally. This level varies across the province as it is dependent upon the level of residential assessment in each municipality. Until 1975, condominium units were assessed at the same proportion of value as multi-family residential property.

The relatively high levels of property tax assessment levied on residential condominium units prior to the enactment of Section 90(2) of The Assessment Act in 1975 stemmed from municipal assessment policies instituted as early as the 1950's. Long before condominiums were developed in Ontario, municipal assessors, despite the lack of legislative authority to do so, had assessed multi-residential property and commercial/industrial property generally at a higher level of value than single-family residential property. Almost without exception, the level of assessment on single-family property was lower than on all other classes of property in all major Ontario municipalities.

This practice of differential assessment continued throughout the 1960's. The inability of municipalities to establish uniform levels of assessment for all property was one of the principal reasons for the provincial takeover of assessment in 1970. An indication of the magnitude of the differentials is shown in data published by the Ontario Committee on Taxation in 1967:

Assessment differentials, 1963

	Level of assessment		
	Residential (Single)	Apartment	Difference
	(i)	(ii)	(iii) (i ii)
Toronto	31.2%	54.3%	57.5%
North York	33.7	50.7	66.5
Hamilton	34.7	48.5	71.5
Scarborough	33.0	62.0	53.0
Etobicoke	36.0	54.1	66.5

(Source: Ontario Committee on Taxation, *Report*, Queen's Printer, Toronto, 1967, Vol. 2, p.249)

Subsequent assessment equalization studies made by the Department of Municipal Affairs in 1968, 1969 and 1970 confirmed these assessment differentials throughout Ontario.

The increase in property values since 1970 has reduced the average levels on all property by as much as two-thirds. It has also increased the differentials between single-family residential property, which has risen in value by the greatest amount, and all other classes.

When condominium ownership was initiated in Ontario, in 1967, the first projects developed as condominium were either conversions of existing rental developments or new projects that had been originally designed for rental. The conversions were not revalued at the lower single-family residential level. They were kept at the multi-residential level in order to maintain consistency with rental units, often located in neighbouring buildings. The new condominium buildings were likewise assessed at the multi-residential level to maintain consistency with the conversions.

Provincial assessment

Provincial assessment in 1970 was based on two principal policy objectives — reassessment in 1974 for taxation in 1975, and maintenance of the existing municipal tax base during the interim period. This latter objective is reflected in Section 85 of The Assessment Act which requires that the assessment rolls returned in 1970 for taxation in 1971 be the assessment rolls during the interim period. The achievement of this objective required that existing condominium assessments be defended and that new condominium units be assessed at the multi-residential level.

Condominium assessment appeals

Beginning in 1970, but expanding significantly in 1971 and 1972, condominium owners organized large-scale appeals against their assessments. The Assessment Division of the Ministry of Revenue defended the assessments on the basis of Section 90 of The Assessment Review Court Act, 1972, a county judge or the Ontario Municipal Board to alter an assessment only if it could be demonstrated that the assessment was inequitable with respect to the assessment of similar real property in the vicinity. Assessors argued that "similar" should be regarded as physical similarity, thereby rationalizing a level of assessment equivalent to that on rental properties. Condominium owners argued that "similarity" should be considered in a broader sense. They claimed that the form of tenure — freehold rather than leasehold — should be taken into account in establishing the level of assessment.

As the volume of appeals increased, one case was accepted by all parties as a test case. York Condominium Corporation No. 26 at 551 The West Mall in Etobicoke had been assessed in the normal manner at the multi-residential level. The owners successfully appealed the 1971 assessments which were reduced by the Assessment Review Court. The Assessment Division appealed the decision to the county judge where the Assessment Review Court's decision was confirmed by Judge Phelan in October, 1971.

Judge Phelan's decision was appealed by the Assessment Division to the Ontario Municipal Board. The Board confirmed his decision and left the assessment at the level established by the Assessment Review Court.

The Assessment Division appealed the Board's decision to the Court of Appeal to determine if the Board had correctly applied Section 90 and if it had properly interpreted the term "similar real property". In its decision handed down in September, 1975, the Court of Appeal deemed it inappropriate to give an answer to these questions, but it did direct the Board to re-hear the case.

Bill 8, amendment to Section 90

During the five years while the York Condominium Corporation No. 26 appeal was working its way through the courts, the volume of appeals by condominium owners increased substantially. Since there was no definitive case law on the interpretation of Section 90, there were conflicting decisions at the Assessment Review Court, depending on the facts of the situation and the evidence submitted. In some instances, the Review Court reserved judgement; in others, the position of the Assessment Division was upheld and the assessments were confirmed; and, in others the appeals were allowed and the assessments were reduced. The Assessment Division appealed all reductions to a county judge or the Municipal Board where decisions were reserved pending a final decision with respect to York Condominium Corporation No. 26. In addition, some unit owners whose assessments were not reduced appealed to a county judge. Other owners dropped their appeals and accepted the Assessment Review Court decision. To further complicate the situation, some owners did not realize that their assessment must be appealed each year in order for the appeal to be effective.

Thus, by the fall of 1975, the appeal picture with respect to condominium units was very complex. There were units with duplicate appeals — the unit owner and the corporation. There were units with cross appeals — the owner (and/or corporation) and the Assessment Division. There were units not under appeal although the owners thought they were. There were units under appeal — by the Assessment Division — which the owners did not realize had been appealed.

It is generally accepted that by the fall of 1975, there were between 25,000 and 30,000 condominium appeals outstanding. The vast majority of these appeals were before the Assessment Review Court, with several hundred at the county judge level and a few before the Ontario Municipal Board.

Recognizing that condominium unit owners were being unfairly assessed in relation to the owners of single-family residences, and because the reassessment had been postponed until 1976, the Government introduced Bill 8 in November, 1975.

Bill 8 amended Section 90 by adding a subsection, 90(2), which provided that condominium units should be assessed at the same level as owner-occupied single-family residence in the vicinity. This legislation applied for 1976 taxes and subsequent years, but was not made retroactive.

Tax rebates

The outstanding condominium appeals were quickly settled on the basis of the level of assessment applied to single-family residences and the municipalities made refunds of taxes to condominium owners throughout 1976.

As the year progressed, some owners who thought their units were under appeal found that they were not and were therefore not eligible for a refund. There are several reasons for this confusion:

- (i) The appeal was not filed properly in the first place. It might have gone to the municipality or regional assessment office rather than the Assessment Review Court. While there is a policy to forward these to the Assessment Review Court some may have been mislaid;
- (ii) The appeal lapsed. If the decision of the Review Court was not appealed, it became final;
- (iii) the appeal was not filed. Those owners who did not realize that a separate appeal must be filed for each year may not have appealed after the first year even though they kept the original appeal open.

Whatever the reason, these owners began a campaign to obtain a tax rebate. They were joined by other owners who had not appealed their assessments and asked for a rebate, or tax credit, when they saw the effect of Section 90(2) on their 1976 taxes. Several condominium corporations and condominium associations supported these requests for tax rebates on properties that had been under appeal when Bill 8 was enacted.

Submissions to the Study Group

During the public hearings, a number of submissions requested that rebates or credits be given to those owners who had not appealed their assessment. In no instances did the rationale for the request go beyond a belief that a rebate was necessary in the interests of equity. Often the requests were included in a more general statement on property taxes and the lack of municipal services. Thus, it was not possible during the hearings to ascertain from the briefs why owners who had not appealed believed they should receive rebates.

The case for rebates as made during submissions, and in other forums, appears to be as follows:

- The enactment of Bill 8 constitutes an admission that condominium units were inequitably assessed.
- Condominium units had been inequitably assessed since they were first permitted.
- The Province assessed the bulk of condominium units and is, therefore, responsible for the inequities.

The concern of condominium owners who believe they have been unjustly dealt with concerning their assessments is appreciated. Nevertheless, it would be irresponsible to accept the requests for retroactive rebates without considering them in the wider context of the entire property tax system and property tax reform as proposed in *Budget Paper E* of the 1976 Budget and the *Report of the Commission on the Reform of Property Taxation in Ontario* (Blair Report).

Condominiums are only one aspect of a property tax base that has, over the past thirty years, become increasingly distorted. The distortions and differentials have produced serious inequities for many types of property, particularly when these properties are compared with single-family residential homes. The government recognized the existence of these differentials and accepted responsibility for removing them in 1969 when the province assumed responsibility for property tax assessment. Until property tax reform is implemented, the vast majority of property in Ontario will be subject to the differentials established prior to 1970.

Between 1970 and 1975, condominium units were assessed at a level higher than single-family residences as part of a policy to maintain the tax base developed by municipalities when they were responsible for assessment. This policy was not an attempt by the Ontario government to discriminate against condominium units in any way; it was followed solely in order to maintain the tax base as it existed in 1970.

Section 90(2) gives tax relief to one group of property owners that will not be achieved by other owners until a reformed property tax system is put into effect. In this respect, the province has discriminated in favour of, rather than against, condominium owners.

In addition, it is recognized that not all condominium owners benefitted equally from Section 90(2). The right of appeal is a legal one that must be exercised and one that cannot be given by default. The assessment appeal system may appear complicated to condominium owners, but they have the same access to it as all other owners. The fact that some owners did not have appeals outstanding in December, 1975, may be due to misinformation or lack of knowledge of the system, indifference to the problem, or even satisfaction with their taxes. This does not give them special status. It merely places them in the same category as all other property owners who have not appealed their assessment (see chapter on Municipal Services).

It is the responsibility of condominium owners, just as it is incumbent upon all consumers, to be attentive to issues that significantly affect their lives, particularly in instances where clear instructions are put directly into their hands. Such is the case regarding tax assessment appeals. The Assessment Notice, which is received annually by all owners, explains the appeal procedure and can be used to directly lodge an appeal (see Chart 6).

For all of the foregoing reasons, the provisions of the Assessment Act pertaining to condominium assessment appeals should not be amended.

Recommendation No. 58:

Property tax rebates or tax credits not be given retroactively to the owners of condominium units who did not have appeals outstanding in December, 1975.

Chart 6

Complaint Procedures

(Section 52 of The Assessment Act, R.S.O.1970, Chapter 32)

If you believe you have been improperly assessed in any way, you or your agent may give notice of the complaint in writing to the Regional Registrar of the Assessment Review Court. See the front of this Notice for the address of the Regional Registrar and the last day for lodging a complaint.

Notice of Complaint

IF YOU WISH TO USE THIS NOTICE for lodging a complaint against your assessment, state your reasons(s) in the space below, sign and forward to the Regional Registrar.

.....
.....
.....

Name of Owner or Agent (Please Print)

Telephone No. Residence

SIGNATURE OF COMPLAINANT OR AGENT

Business

MAILING ADDRESS

IF YOU WISH TO LODGE A COMPLAINT AGAINST YOUR ASSESSMENT AND RETAIN THIS NOTICE, you may obtain a Notice of Complaint form from the office of your local Municipal Clerk, or include the following information on a separate sheet of paper headed "Notice of Complaint", and forward to the Regional Registrar:

1. Name, Mailing Address, and Telephone No. of Complainant.
2. Location and Description of Property under Complaint (see front of Notice of Assessment).
3. Assessment Roll Number (see front of Notice of Assessment and set down in the order in which they appear on the Notice of Assessment the numbers shown under the headings CNTY. (County or Region), MUN. (Municipality), MAP (Map Division), SUB. (Subdivision). PARCEL, TENANT).
4. Reason(s) for Complaint.
5. Signature of Complainant or Agent.

Chapter 10

The condominium corporation

A unique element of a condominium corporation is its nature as a privately owned and operated community whose activities are directed internally. From the information received during the public hearings, it became apparent that the first two years of a corporation's existence are the most critical. It is during this period that the framework of the corporation is created and precedents are set which will often have a long-term effect on the owners.

Much of the responsibility for creating a successful condominium community rests with the developer. It is he who creates the corporate structure and who therefore has the greatest impact. The developer who accepts the responsibility for the community he has created should communicate as effectively as possible with the owners. This enables the developer to determine where the problems in the project are and lets purchasers know that the developer has some concern about their comfort and satisfaction.

Records and information

It is virtually impossible for a group of inexperienced individuals to step in as members of the board and commence running a corporation. Great assistance is necessary at the initial stages from the developer, who also has a vested interest in ensuring the project's success. It was repeatedly mentioned by condominium groups that one of their most serious problems was the lack of information which could assist the new Board of Directors, about the project itself including such items as who the maintenance contractors are, what warranties are available, what mechanical and electrical systems are in the project, and who is available, if anyone, from the developer's business for assistance. Because of difficult start-up problems with developers, many owners may be over-anxious to remove the developer's influence entirely from the board as soon as possible. This can be a mistake. As the person who put the project together and who has access to all those who were involved in it, he can, in fact, be of valuable assistance to a board. As some board members have indicated, any of the owners who were most satisfied with condominium living were in corporations where the developer-purchaser relationship was co-operative and informative. Greater emphasis should be directed towards this end by the parties involved.

Section 9b(1) of The Condominium Act requires that a meeting of owners be held by the developer within 42 days after he has transferred ownership of more than 50 per cent of the units. Section 15b(1) provides owners and mortgagees the right to investigate the records of the corporation relating to the disposition of money paid by an owner through common expenses. (From the time a purchaser becomes an owner, Section 15b of The Condominium Act gives him the right of access to the corporation's records).

These two sections deal with separate areas of concern to condominium owners. One of the problems encountered in applying Section 15b(1) is the lack of definition for the word "records". The reason these two sections should be tied together is that the "turn-over" meeting of owners referred to in Section 9b(1) should be expanded to include the provision of enumerated documents to the first owner-represented Board of Directors. The documents which a developer would be required to turn over to the owner's Board should also constitute "records" within the context of Section 15b.

Recommendation No. 59:

The Condominium Act be amended to require that a developer or his representatives provide the following items at the turnover meeting of the corporation referred to in Section 9b:

A. Warranties and guarantees on all "equipment" for the common elements or any other item for which the corporation is required to provide maintenance or repair (see chapter on Construction).

Warranties and Guarantees on items within the units for which the unit owner bears responsibility should be turned over to the owner on occupancy of the unit or on completion of the sale transaction.

B. As-built architectural, structural, engineering, electrical, mechanical and plumbing plans, plus underground site services, site grading, drainage, cable television and landscaping, which are part of the condominium property and for which the board has responsibility of repair and maintenance.

C. Copies of all contracts and agreements entered into by the developer which affect the corporation, including service contracts, management contract, site plan agreement, insurance agreements, and easements or licenses.

D. A financial statement prepared no earlier than 30 days prior to turnover for the period from registration to not less than 30 days prior to the date of the statement. The statement should include the depreciation period of capital equipment for the common elements, budget, balance sheet of income and expense, and all financial records necessary to prepare the financial statements.

E. A table showing the maintenance responsibilities as a schedule (see Chart 5 for an example).

F. Bills of sale or transfers for all furnishings, equipment, etc., which are not part of the common elements.

G. Current documentation — declaration, description, by-laws, rules and regulations.

H. Minute books of corporation and corporate seal.

Recommendation No. 60:

The Condominium Act be amended to define the word "records" to include items in Recommendation No. 59 but not limit the definition to those items. In addition to items in Recommendation No. 59, the definition of "records" should include any financial reports supplied by the corporation's manager, minutes of annual meetings and board meetings, any amendments to documentation passed by the corporation, and all notices of meetings.

There are several sections in The Condominium Act and in the regulations to The Condominium Act which imply that every condominium corporation requires a corporate seal. Yet, nowhere in the legislation is it specifically required. Some examples are Section 8a(2), which requires a lease of the common elements to be under seal, and Forms 6b, 7 and 8 of Reg. 98.

Recommendation No. 61:

The Condominium Act be amended to require that every condominium corporation have a corporate seal.

Problems of "sweetheart" contracts

It is not uncommon for a development firm to contract with its own subsidiary company to provide services to the condominium corporation at highly favourable rates to these companies, an excessive cost which must be borne by the corporation until the contract expires. One example of such a "sweetheart" contract is an Ontario developer who rented condominium corporation facilities including space and hot water to a subsidiary at below market rental and charged the condominium corporation the market rate for use of the laundry machines.

In other instances, prior to registration, the developer may sign a contract with a service company that gives the corporation incompetent or uneconomical services. Any time a developer makes a bad deal with a service company prior to registration, the condominium corporation is stuck with a business relationship it probably would not have approved if its Board of Directors had been in control at the time of contract negotiation.

Recommendation No. 62:

The Condominium Act be amended to provide that no contract entered into by the developer's board be for longer than 18 months from registration unless ratified by a board elected by purchasers. This, however, should not replace the owners' rights to terminate a management contract pursuant to Section 15(a).

Responsibilities of the board

Once the board is in place and all the information has been turned over by the developer, the board must clarify its responsibilities and obligations in terms of The Condominium Act and the documents governing the corporation. The following are the major duties and responsibilities of the board:

- 1) Ensuring proper maintenance of the common elements and facilities.
- 2) Keeping proper financial records.
- 3) Preparing budgets and setting common expense fees.
- 4) The formulation of rules and regulations and by-laws.
- 5) Approving any legal action against owners who fail to pay their common expense fees or who do not abide by the condominium documentation.
- 6) Enforcing compliance with the documentation.
- 7) Choosing a lawyer and recommending an auditor (see chapter on Financial Management).
- 8) Employing qualified property managers, independent contractors or employees, and supervising their work.
- 9) Appointing committees and assisting them in their tasks, particularly in larger corporations.
- 10) Overseeing the development of recreational and social programs to meet the needs of the owners.
- 11) Ensuring adequate insurance coverage.
- 12) Notifying owners of assessments and meetings which require the owners to vote.
- 13) Ensuring that all employees of the corporation are fidelity bonded.
- 14) Representing the interests of the owners in matters dealing with common elements.
- 15) Communicating with the owners so that the corporation's business is conducted in an atmosphere of openness and trust.

A newly elected board should define the responsibilities of its officers and elect its members to the offices for which they are most qualified. The president is the senior officer and presides at all meetings of the board and owners. The vice-president takes over the president's duties when the president is unable to fulfill them. The secretary is responsible for transcribing and distributing minutes of meetings, keeping an accurate minute book, maintaining the official records of the corporation, handling proxies assigned to the board, ensuring that notices of meetings are given, filing of amendments to documents and communicating board activities to the owners. As soon as possible after the election of a board, the secretary should notify the owners of the names of the board members, committee chairmen and their addresses and phone numbers. The treasurer, before the beginning of the corporation's fiscal year, is responsible for preparing the annual budget which is presented to the board. It is his responsibility to ensure that the corporation operates within its budget.

The treasurer should maintain the financial records of the corporation and prepare the monthly statements of receipts and disbursements, including a list of delinquent owners and ensuring that action is taken against them. The treasurer should also arrange for the annual audit of the corporation and generally be able to handle all inquiries of a financial nature.

The board of directors also bears responsibility for "grooming" new talent and this can best be achieved by utilizing the "farm system". By this method the board creates committees to assist the board in its daily operations (for example, the finance and social committees). From this committee system the board can find other owners within the corporation who are prepared to actively participate in the ongoing affairs of the corporation. The committee system serves a dual purpose. It trains those who might eventually be prepared to undertake a role on the board of directors and it provides an opportunity for an existing board to gain the assistance of interested owners.

Protection for board of directors

Since The Condominium Act specifically excludes the application of The Corporations Act, the extent of directors' liabilities are not, at present, determined by statute.

The job of serving on the board of directors of a condominium corporation can be onerous, as well as satisfying. The duties of the corporation, as set out in The Condominium Act, are to manage the property and assets of the corporation.

Under The Corporations Act of Ontario, the manner of handling corporation business and the legal responsibility of members of the board of directors are clearly set out. Under The Condominium Act, however, this is not the case. The liability which could, in fact, attach to condominium board members would have to be decided on the basis of common law principles.

The majority of condominium declarations or by-laws provide that the members of the board shall be indemnified by the members of the corporation for any act carried out by them, provided the board members have not acted unlawfully or with willful neglect. The Study Group feels, however, that this protection is inadequate.

Indemnification is an after the fact protection. It would be better to avoid law suits in the matter in the first place.

Recommendation No. 63:

The Condominium Act be amended to provide that board members be excused for any act done in good faith in the carrying out of their duties as specified in the declaration and by-laws.

It also became apparent during the course of the hearings that many boards, while carrying out their intentions in a fair and reasonable manner, were doing so without proper procedure, or on interpretations of a statute and documents which were not legally sound. Many consumer groups expressed their concern over their lack of expertise in dealing with the Act and documents. One brief even suggested that all condominium corporations be required to have legal counsel. The Study Group is not prepared to make a recommendation of that nature mandatory, but we do feel many boards would find that legal advice on various matters would be of great assistance. Although many corporations expressed their concern about the cost of retaining legal counsel, proper use of a lawyer can save money in the long run. Legal services will normally cost more in stop-gap procedures than on a continuing preventative basis.

Many briefs stated that although their corporations would like to retain a lawyer, they did not know how to find one with the proper expertise. This is one of the roles which could be filled by local condominium associations. An effective local association could be valuable in directing board members not only to competent counsel but also to accountants, management firms, independent contractors and municipal and provincial officials involved in the condominium field.

The corporation and legal actions

The power to sue

It is clear that a condominium corporation has the power to sue if a contract with the corporation is breached by another party.

Section 26 of The Interpretation Act vests in a corporation the power to sue and be sued, and exempts individual members of the corporation from personal liability for its debts, obligations or acts, if these powers do not contravene the provisions of the Act incorporating the corporation.

A slight ambiguity arises with respect to an asset of the corporation. The corporation has the power under Section 9(15) of The Condominium Act to own real and personal property and under The Interpretation Act would therefore have the power to sue if the property is damaged.

However, under 9(16), owners of the corporation share its assets in their respective common interest proportions. It is not clear whether this means that the owners of the corporation would have to join in any law suit with respect to these assets, or whether the condominium corporation is acting as a trustee on behalf of the owners.

The situation is clearer with regard to common elements. Under Section 9(18) of The Condominium Act, the corporation may bring any action with respect to the common elements. If the common elements become damaged, the condominium corporation may bring an action.

A problem arises with respect to common elements that were incomplete or improperly built by the builder. The condominium corporation itself was not a party to any agreement with the builder as to what common elements were to be supplied or the quality of workmanship to be provided and so has difficulty in showing that the builder owed a duty to it.

Notwithstanding this problem, in the case of *Frontenac Condominium Corporation No. 1 vs. Joe Macciocchi and Sons Ltd.* the condominium corporation was permitted to bring an action with respect to construction deficiencies in the common elements. In this case, it was considered prudent to have included, as plaintiffs, the unit purchasers as a class, for if the condominium corporation did not have the power to sue for construction deficiencies, then the unit owners as a group might have had the power.

A problem arises with this technique because, if the basis of the claim is that the builder represented that there would be certain items included in the common elements, then the only people constituting the class of plaintiffs would be those who originally purchased from the builder. Subsequent owners would not be a part of the class.

If the class action is the proper vehicle for legal action based upon deficiencies then surely the recoveries from the builder belong to those purchasers, not to the owners on resale and not to the condominium corporation.

The Condominium Act gives the corporation the duty to manage the affairs of the corporation. This implies both rights and responsibilities with which the board is charged. In any community of this type, unit ownership is constantly changing and all the owners may not be parties to the contract with the party with whom there is a dispute. Thus, there must be a vehicle through which the rights of *all* the owners affected by such a dispute can be resolved. If the only alternative available to achieve a resolution is by legal action, then it should be the condominium corporation which represents all the owners where their interests are affected. In a condominium community the individual owners' lack of privity should not be an issue.

The rights to legal action between owners and the corporation and the corporation and "outsiders" should be clearly spelled out in The Condominium Act. Condominium corporations should be able to represent all owners without having to resort to court applications to determine if they must proceed by way of a class action.

Recommendation No. 64:

The Condominium Act be amended to provide that the condominium corporation may act as a representative of the unit owners with respect to the common elements, the corporation's assets and two or more of the units in the corporation, notwithstanding that the corporation was not a party to the contract on which the action is brought.

The power to be sued

The situation with regard to the rights of a claimant against the condominium corporation is even more unclear.

The condominium corporation may be sued for a breach of contract and if the action arises as a result of a breach of duty as an occupier of land, the condominium corporation is deemed to be the occupier of the common elements (according to The Interpretation Act and Section 7(12) of The Condominium Act.

However, it is unclear whether or not there is a distinction between the condominium corporation's obligations as an occupier of the common elements and general tort (civil wrong) liability.

It may be that a solicitor for a plaintiff will have to distinguish between these liabilities and sue the corporation only if there is a tort resulting from its obligation as the occupier of the common elements. The solicitor might have to sue the unit owners as a class if there is some other tort, such as libel resulting from a statement in the condominium newsletter.

Recommendation No. 65:

The Condominium Act be amended to provide that the condominium corporation may be sued as representative of the unit owners as a class.

Under Section 9(17), a judgment for the payment of money against the corporation is also a judgment against each owner at the time the cause of action arose. In the event the claimant wins, he can hope that the condominium corporation pays. Otherwise, the sheriff's office would seize the corporation's assets and probably the bank accounts, in spite of arguments that the corporation is merely holding this money in trust for the unit owners.

In this sense, the owners of the condominium corporation do not have the limited liability protection of The Interpretation Act.

If the condominium pays, it may levy a special assessment against each current unit owner or take money out of operating revenue, which would amount to the same thing.

If there are insufficient assets, the claimant may proceed against the unit owners at the time the cause of action arose. In this situation, the unit owner who may be a former unit owner, would be responsible for a portion of the judgment in the same proportion as was allocated to this unit in the common expense allocation in the declaration without limitation. It is thus possible for the amount recovered from the unit owner to be more than the value of his unit. This emphasizes the value of having a good condominium liability insurance policy (refer to chapter on Insurance).

To make the situation more complicated, there is the following statement in *Frontenac Condominium Corporation No. 1. vs. Joe Macciocchi and Sons Limited*: "There is no limited liability protection for the owners, as is normally understood. If a judgment is made against the corporation, each unit owner is responsible for a percentage of the judgment which is the same as his percentage for sharing the common expenses."

This quote implies that the interpretation of the legislation, that it was the unit owners at the time the cause of action arose who were liable, is not the case.

Currently, Section 9(17) creates great difficulty for creditors who must recover money owing to them by the registration of a writ of execution. The registration of a writ of execution in the Sheriff's Office entitles a creditor to seize the assets of a judgment debtor. The registration of a writ against title to the property enables the creditor to recover the money owed to him at the time the unit is dealt with.

Since Section 9(17) of The Condominium Act states that the creditor's rights are limited to those who owned units at the time the cause of action arose, it imposes great additional expenditures in time and money on the creditor who is required to trace individuals who may no longer be the owners of the premises.

One of the difficulties facing Ontario's condominiums is the inability to borrow money from many lending institutions (see chapter on Lending Institutions). This factor, coupled with the difficulties a creditor is faced with in attempting to recover money that a court has decided is owing to him, could lead to increased problems for Ontario's condominium corporations.

Recommendation No. 66:

The Condominium Act be amended to provide that a judgment against a condominium corporation is deemed to be a judgment against the owners at the time of the judgment.

Condominium meetings

The operation of a condominium corporation requires owner participation at various levels. Owners must learn to co-exist in a community in which their daily lives are somewhat regulated by a statute and subordinate documents. Owners who feel a responsibility towards the condominium corporation attend general meetings of the owners to vote on issues brought before them by their board of directors or other owners. Many owners who play a more active role in the condominium's operation become members of the board of directors and attend directors' meetings.

At the public hearing and in briefs presented, many directors and owners said that confusion often existed at meetings because owners were not familiar with methods of running meetings. This is understandable, especially in the early stages of a corporation's existence, since most owners would not be exposed in their daily lives to meetings requiring clear structure and efficient procedures.

Many corporation briefs, for example, expressed concern over owner apathy. They claim it is nearly impossible to get owners out to meetings to deal with issues only they can vote upon and which require high voting percentages. The condominium owners' participation to date seems to be reactive to particular issues, rather than one of ongoing interest in the community in which they live. However, owners are far from the only group at fault, for problems also arise from disarray within a board or interference from a developer.

Since the Study Group was charged with bringing forth a package of measures to improve condominium living, many of the comments here are not properly the subject of legislative amendments. Rather, they are often designed to give guidance to those corporations experiencing difficulties. For this reason, it is worthwhile to outline the conduct of directors' meetings, owners' general meetings, and annual meetings.

Directors' meetings and annual meetings

The frequency of board meetings should be determined by its members. This decision will depend on the size of the corporation, the type of corporation and the amount of work to be done by the board. For every board meeting, the owners should be notified of the time and place and be invited to attend, except for discussions of disciplinary actions, when necessary. Such notification not only allows owners to exercise their right to participate, but encourages an atmosphere of open communication, which board members should always strive for. Convincing owners that they are needed at meetings is crucial. Owners must be shown that their participation will pay off in the long run.

As well as personal communication, a corporation newsletter, for example, is a very effective means of communication between boards and owners. A newsletter can be used to publicize the agenda for the board meeting in advance and request owners to submit in writing any matters they might wish the board to discuss. Once owners know they are welcome, the board should use its best efforts to make the experience rewarding for those who do attend.

In the case of annual meetings, advance publicity of the meeting and of the names and qualifications of those seeking election may stimulate interest and attendance. Again, the newsletter or personal communication are both useful.

The following procedural guidelines might be considered for both directors' meetings and annual meetings:

- a) start punctually
- b) ensure Directors have had an opportunity to review the agenda and any back-up materials so that they are informed for discussions
- c) call the meeting to order
- d) secretary reads the minutes of the previous meeting and deals with business arising from them (a good idea is to distribute the minutes prior to the meeting for review; time can also be saved by a motion to dispense with reading of minutes and to accept them as written)
- e) report from the treasurer
- f) report from the property manager
- g) report from the auditor
- h) committee business (either standing or special committees)
- i) deal with new business
- j) comments from owners
- k) adjournment (it is a good idea to set a definite time for adjournment at the beginning to encourage moving the meeting along in a business-like way)

Board members should try to deal with the business at hand as quickly and thoroughly as possible. Otherwise, a prolonged, non-productive meeting will discourage owner and even board member attendance. The quality and length of a board meeting will depend largely on the effectiveness of the chairperson. Those chairing the meetings should become familiar with Robert's Rules of Order and Wainberg's Company Meetings including Rules of Order.¹

Notice of meetings

Sections 9a(5) and 9a(6) of The Condominium Act deal with providing notice of meetings to owners and mortgagees, and identify which owners are entitled to receive the notices.

At the public hearings, concern was expressed by directors and owners that under existing legislation, serving notice must be effected on the owners and mortgagees, either personally or by prepaid post.

Service of notice personally requires that each owner be served in person; as proof, an affidavit that service was effected must be sworn by the person serving the notice. If there is more than one owner of a unit; husband and wife, for example, each must be personally served.

Services of notices by prepaid mail to the owner and mortgagee also requires a separate letter for each owner. The cost of sending these notices by mail can add substantially to a condominium corporation's budget.

Under the existing legislation there is also no control over absentee owners, who may rent their units without notifying the corporation of their addresses. Although there is no requirement that a corporation serve owners or mortgagees at other than their addresses shown on the register, many boards feel they must seek out the absentee owners.

Recommendation No. 67:

The Condominium Act be amended to permit a board of directors to give notice to owners by delivery of the notice to the unit. The requirement of service by pre-paid mail or personally would apply only when service is being effected on a mortgagee or owner who has notified the corporation of his address and is not in occupancy.

Meeting of owners

A condominium corporation is required to hold the first annual meeting not later than three months after title to 50% of units has been transferred by the developer to the purchasers, and the next annual meeting not more than 15 months thereafter.

Under the existing legislation, there is no requirement that information be disclosed to the owners, but it is required that they be notified of any business to be dealt with at the meeting. Unless the Board of Directors so chooses or it is set out in the condominium's documents, no financial or background information need be made available in advance.

¹J.W. Wainberg, *Wainberg's Company Meetings including Rules of Order*, 2nd ed. (Toronto: Canada Law Book Co., 1969) 230 pages including table of cases, glossary, forms and index. The only Canadian work dealing directly with rules for company meetings. Henry M. Robert III, ed., *Robert's Rules of Order Revised* (New York: William Morrow and Co., 1971) 323 pages, including table of rules, plan of study with lessons outline and index. This book has for many years been the standard guide to the rules of parliamentary procedure observed by Congress (the fact that it is an American text does not preclude its application in Canada).

To stimulate interest and create an environment of communication and trust between boards and owners, information concerning issues to be dealt with at meetings must be provided to all owners at the time notice of the meetings is given.

Since the condominium concept is predicated on decision-making by the owners, it seems only reasonable that any choices made by them be informed ones. For instance, where a vote is put to the owners, they should have the opportunity to study the background information submitted. This approach coincides with the principle of full and open disclosure and communication between owners and boards.

Recommendation No. 68:

The corporation provide with the notice of meeting any background information regarding decisions being put to the owners for approval or a vote.

Removal of board members

Subsections (7) and (7a) of Section 9 of The Condominium Act deal with the removal and replacement of members of the board of directors. These subsections were enacted in 1975 to establish a procedure which could apply to all condominium corporations where the members had either a vacancy on the board or wanted to remove a member of the board.

Subsection (7) enables the majority of a board of directors to appoint a replacement where a vacancy on the board occurs. Subsection (7a) enables owners who own a majority of the units to remove a member of the board of directors before the expiry of his term and replace him.

There are two problems which might arise from the reading of these two subsections together. First, if a member of the board is removed in accordance with subsection (7a), the board may view it as a vacancy and replace the removed director under subsection (7).

Recommendation No. 69:

The Condominium Act be amended to clarify that:

A. Where a member of the board of directors is removed pursuant to Section 9(7a), that this not be considered a vacancy in the board under subsection (7).

Second, if a director is removed from office by a vote of owners representing a majority of the units, his replacement will be elected by that same voting majority, where the corporation's by-laws may stipulate a different majority for election of board members.

B. When a board member is removed in accordance with Section 9(7a), a new member be voted into office by the owners in compliance with the corporation by-laws dealing with election of directors.

Voting requirements

Before proceeding further in this chapter, it is important to clarify the definition of owners and members. Throughout The Condominium Act there are ongoing references to owners and members. The term "owners" is defined in Section 1(1) of the Act "as owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee in possession". Section 9(1) of the Act states that the registration of a declaration and description creates a corporation without share capital whose members are the owners from time to time.

It has become the custom for these words to be used interchangeably, yet some sections refer to "owners consenting" and others refer to "meetings of members". Members may make by-laws, make substantial additions or changes to common elements, and terminate management control, while owners may vote for repair after damage, authorize sale of the property, and authorize termination of the condominium. This dual use of terms has led the Study Group to consider a possible problem. The mortgagee under Section 22 of The Condominium Act has the right of an owner to vote or consent, but a mortgagee does not necessarily have the rights of a member. If the mortgagee does not have the rights of a member, it is possible that he may not have the right to vote on by-laws.

There is no reason for continuing to use the dual terms; in fact, continued use of the terms could lead to a dispute.

Recommendation No. 70:

The Condominium Act be amended to use only the term "owners" and not "members" in specifying rights and obligations.

Section 14(1) of The Condominium Act provides that 80 per cent of the members of the corporation are required to vote in favour of a "substantial addition, alteration, improvement or renovation of the common elements or corporation assets". A change which is not substantial requires only a majority vote of the members.

Some condominium documents state that the Board can determine what is substantial; others do not deal with the matter at all.

Due to the condominium corporations' variety of size and services provided, it is impossible to arrive at any formula that would apply equitably in all situations, and to give Boards a universal definition of what constitutes "substantial".

Legislation often contains words such as "reasonable" and "substantial" because of the inherent difficulties in creating a standard which can apply in all circumstances. The nature of condominium decision-making, however, demands greater certainty for those involved in the process.

Recommendation No. 71:
The Condominium Act be amended to provide that the Board of Directors of a condominium corporation may determine what constitutes a "substantial" change in common elements or assets.

Responsibility should lie with the Board to consider any change in relation to a percentage of either annual operating costs or accumulated reserve funds. As well, it should consider factors such as continuing expense to the corporation and the overall effect on owners in deliberating on what is substantial. While the right to decide this issue should rest with the Board, it must notify the owners of its decision, and the owners should have a right to call a meeting to overturn such a decision, in accordance with Section 9a(3). This fits in with a later recommendation that 15 per cent of the owners can request a meeting and a decision can be made by more than 50 per cent of the owners present or by proxy.

Voting majorities
 One of the most frequent concerns expressed at the public hearings by condominium owners was their inability to amend the declaration, by-laws, and rules and regulations (a guide to the percentage majority currently required to affect particular votes is in Chart 7).

This voting procedure requires that the vote of each person be calculated in accordance with his percentage of ownership interest as set out in the declaration; once all the votes are calculated, a total of votes of all the ownership interests in favour is required to approve a change. This procedure is cumbersome and time-consuming, and it negates the principal of secret balloting.

Chart 7

Matters contained in The Condominium Act and votes required

<i>Section</i>	<i>Purpose of Vote or Consent</i>	<i>Percentage Majority Required</i>
3(3)	To amend declaration	100% of owner and encumbrancers
8a(1)	Granting leases or easements	Members who own 66-2/3 of the common elements
7a	Removal of director	Members who own a majority of units
9a(3)	Calling of meetings	Members who own 25% of the common elements
10(1)	Making by-laws	+Members who own 66-2/3 of the common interests
11(1)	Making rules	Members who own majority of units
14(1)	To make substantial alterations to common elements	+Members who own 80% of common interests
14(1)	Making non-substantial additions or alterations to common elements or assets of the corporation	Majority of members
15a	Termination of management agreement	Members who own 66-2/3 of common elements
17(2)	Vote to repair where damage over 25% of the buildings	+Owners who own 80% of common elements
19(1)	Sale of property or part of common elements	+Owners who own 80% of common elements and 100% signature on deed
20(1)	Termination of government	+Owners who own 80% of common elements and 100% signature on notice of termination

+or such greater percentage as is specified in the declaration or by-laws

Recommendation No. 72:	Existing:	Recommendation:
<i>The Condominium Act be amended to provide that:</i>		
<i>A. Voting be on the basis of one vote per unit, rather than on the total of percentage interests.</i>		
<i>B. Where there is more than one owner of a unit, only one owner can vote.</i>		
<i>Declaration</i> An amendment to the declaration requires 100% consent of the owners and mortgagees or an order of a judge of the County or District County; the court application is only of assistance if the change being sought is to correct a manifest error or inconsistency in the declaration. Since there is a mechanism available for court resolution, this chapter deals primarily with changes by voting majorities.	3.(1) A declaration shall not be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains,	Unchanged
	(a) a statement of intention that the land and interests appurtenant to the land described in the description governed by this Act;	
	(b) the consent, in the prescribed form, of every person having a registered charge, mortgage, lien or other claim securing the payment of money against the land or interests appurtenant to the land described in the description, other than a municipality having a registered agreement with the owner of the land described in the description or with any predecessor in title of the owner;	Eliminate (b)
The court application is made on at least seven days notice to the corporation, to every other unit owner and to the judge. If he is satisfied that an amendment is necessary, he may make an order. Unfortunately, there is no requirement that encumbrancers of the units and common elements be notified of the application. As it is probable that the judge will insist that they be notified as a condition of the order, the lack of requirement for such notice in the Act may be misleading.	(c) a statement, expressed in percentage, of the proportions of the common interests;	Unchanged
	(d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expense; and	Unchanged
Recommendation No. 73: <i>The Condominium Act be amended to require notice to encumbrancers of an application to amend the declaration or the description because of a manifest error or inconsistency.</i>	(e) an address for service, R.S.O. 1970, c.77, s.3(1); 1974, c.133,s.2(1)	Add the words: "and a municipal address for the corporation, if different".
When an individual purchases a condominium unit, he does so with the knowledge that certain matters governing the corporation are basically secure for all time. An owner who purchased a unit knowing that he was entitled to a 2 percent interest of the corporation might be adversely affected if the other owners were able to change his ownership interest to 1.2 percent without his concurrence. For this reason, there should be no change in the unanimity requirement for an amendment to the declaration. The voting majorities for the declaration should remain intact, but to alleviate the problems now facing the corporations, certain items currently dealt with in the declaration and by-laws should be moved from the declaration to the Act or by-laws, provisions should be standardized where possible, and the number of items currently included in condominium declarations should be reduced.	(2) In addition to the matters mentioned in subsection 1, a declaration may contain,	
	(a) a specification of common expenses;	Unchanged
	(b) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;	(b) becomes s.3(1) (f)
	(c) provisions respecting the occupation and use of the units and common elements;	Unchanged
	(d) provisions restricting gifts, leases and sales of the units and common interests;	Unchanged
Recommendation No. 74: <i>The Condominium Act be amended to eliminate the inclusion in the declaration of those items which would be better dealt with in the Act or the by-laws.</i>		
The following are the sections of the Act. Beside each of the paragraphs it is indicated where the item should be appropriately dealt with.		

(e) a specification of the number, qualification, nomination, election, term of office, compensation and removal of members of the board, and the meetings, quorum, functions and officers of the board;	To be included in the by-law	<p><i>By-law</i></p> <p>Voting procedure related to changing the by-laws require simplification to ensure that condominium corporations comply with them and to encourage participation of unit owners. Currently, an amendment to the by-laws requires a 66-2/3 per cent vote of the ownership interest. There are two existing problems with this requirement.</p>
(f) a specification of duties of the corporation consistent with its objects;	Unchanged	
(g) a specification of the majority required to make by-laws of the corporation	Unchanged where the corporation is less than 9 units; otherwise to be included in statute	<p>First, many condominium corporations are finding that it is virtually impossible to hold a meeting where a 66-2/3 per cent vote can be obtained, either in person or by proxy. Apathy is one of the greater difficulties facing Ontario's condominiums. Thus the current 66-2/3 per cent vote requirement hampers many corporation boards from effectively managing the corporation.</p>
(h) provisions regulating the assessment and collection of contributions towards the common expenses;	(h) to be included in the by-law	<p>Recommendation No. 75:</p> <p><i>The Condominium Act be amended to provide that the voting majority to amend by-laws be reduced to a vote in favour of the by-laws or amendments thereto of more than 50 per cent of the owners of all the units.</i></p>
(i) a specification of the majority required to make substantial changes in the common elements and the assets of the corporation;	To be included in statute	<p>Second, The Condominium Act, in defining various voting majorities, uses such phrases as "members who own 66-2/3 per cent per cent . . . of the common elements . . .". This usage of the term "common elements" appears to be incorrect, as in Section 7(2) an undivided interest in the common elements is appurtenant to each unit and therefore a member would vote his share in 100 per cent of the common elements. The "common elements" is the property. The "common interests" are the percentage interests in the common elements appurtenant to a unit. No recommendation is needed as the one vote per unit recommendation will rectify the situation.</p>
(j) a specification of any provision requiring the corporation to purchase the units and common interests of any dissenters after a substantial addition, alteration or improvement to or renovation of the common elements has been made or after the assets of the corporation have been substantially changed;	Unchanged	<p>The reduced voting majority to amend by-laws will not be detrimental to those seeking security in their documents. This will be coupled with recommendations concerning standardizing documents, where possible, including current by-law provisions in the Act, and moving some of the by-law provisions into the rules and regulations.</p>
(k) a specification of any allocation of the obligations to repair and to maintain the units and common elements;	Unchanged	<p>The foregoing recommendations will only give the desired results if the recommendation concerning standardization of documents is also accepted (see chapter on Registrar).</p>
(l) a specification of the percentage of substantial damage to the buildings and a specification of the majority required to authorize repairs under section 17;	To be included in statute	
(m) a specification of the majority required for a sale of the property or of part of the common elements;	To be included in statute	
(n) a specification of the majority required for the termination of the government of the property by this Act; and	To be included in statute	<p><i>Rules and regulations</i></p> <p>The purpose of rules and regulations is to prevent unreasonable interference with the use and enjoyment of the units and common elements. The Condominium Act allows a corporation to make rules and regulations respecting the use of common elements only if such a provision is included in the by-laws. Currently, in order to pass such rules and regulations, a vote of more than 50 per cent of the owners is required. Some developers fail to include this provision.</p>
(o) any other matters concerning the property.		

Many boards of directors are unable to function effectively because of continually having to resort to voting majorities which are impractical, given the issues to be decided by the owners.

Recommendation No. 76:

The Condominium Act be amended:

A. To remove the requirement that a provision regarding the enacting of rules and regulations be included in the by-law.

B. To provide that all corporations have the power to pass rules and regulations which are reasonable and consistent with the Act, declaration and by-laws of the corporation.

The provision for the making of rules in the current Act allows them to be made only "respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements".

Unfortunately, this means that the condominium corporation cannot pass rules relating to the use of units so as to eliminate noise or other sources of interference with other units. In an equivalent rental project, the landlord would be able to enforce rules against noise for the benefit of other tenants. The condominium owner does not now have the right to look for this protection from the condominium corporation.

Arguments may be made that the condominium corporation should not interfere with an owner's behaviour within his own unit unless this regulation is done by by-law with the consent of the owners. The counter-argument is that it is necessary for the corporation to react quickly to prevent new abuses, which can have a profound effect on the owners due to the high density and close interaction in the project.

Recommendation No. 77:

The Condominium Act be amended:

A. To eliminate Section 10(1) (b) regarding by-laws governing the use of units for the purpose of preventing unreasonable interference with the use and enjoyment of common elements and the units.

B. To allow rules "respecting the use of the units and common elements for the purpose of preventing unreasonable interference with the enjoyment of the units and common elements".

Matters dealt with by rules and regulations can properly be dealt with by members of the board. In our literature search of other jurisdictions, we discovered that few, if any, corporations are required to put matters before the unit owners that were dealt with by rules and regulations. Due to the general apathy of owners and the need to allow the corporation to govern itself through elected representatives, members of the board should have the authority to enact rules and regulations. We do feel, however, that a safeguard measure is necessary.

Recommendation No. 78:

The Condominium Act be amended:

A. To permit the Board of Directors to make rules and regulations.

B. To eliminate the requirement that 50 per cent of the owners vote in favour of a rule or regulation.

C. To require the Board to notify unit owners 30 days in advance of a rule or regulation becoming effective and, where necessary, to explain the effect of the rule or regulation.

Recommendation No. 79:

The Condominium Act be amended to reduce the percentage required to call a meeting of owners for any purpose to 15 per cent of unit owners.

Recommendation No. 80:

The Condominium Act be amended to require a vote of more than 50 per cent of the owners of all the units to overturn a decision of the board of directors concerning rules and regulations.

If the owners object to a rule or regulation and 15 per cent of them petition the board for a meeting, the board must either call a meeting in accordance with Section 9a(3) to deal with the issue, or postpone enactment of the rule or regulation until the issue can be dealt with at a general meeting. When a meeting is called to deal with the matter, an opposing vote of more than 50 per cent of the owners of all the units will be required to defeat the proposed rule or regulation.

Condominium owners also have the additional safeguard of the right to remove a member or members of the Board by a vote of more than 50 per cent of the owners. Section 9(7a) of the Act gives the owners this right.

Correction of voting majority requirements alone, however, will not remove all problems related to requirements for members' consent. Section 19 of The Condominium Act allows sale of the property or any part of the common elements, resulting from the authorization of a vote of owners who own 80 per cent, or such greater percentage as is specified in the declaration, of the common elements, and the consent of the persons having registered claims against the property.

However, a deed or transfer must be signed by all the owners and a release of claim or discharge must be signed by all the persons having registered claims against the property. This negates the value of having a less than 100 per cent voting requirement.

A method of disposing of all the property is recommended in the chapter on Termination. A less drastic method of disposing of property is desirable for the sale of a part of the common elements.

Recommendation No. 81:

The Condominium Act be amended so that the signing officers of the corporation can certify as to the authorization by the required majority of a sale of part of the common elements and sign the deed or transfer resulting from this.

Renting of units

Throughout the course of the hearings, briefs were presented dealing with rentals in condominium projects and the problems created when owners and non-owners are living together in a condominium community. The rental of units occurs in three situations:

- a) developers leasing units
- b) speculators purchasing and then leasing units
- c) owner-occupiers leasing units

Developers' leasing of units

In 1975, The Condominium Act was amended to include Section 24d, which prohibits a developer from leasing unsold units in a condominium project unless the lessee has entered into a bona fide agreement of purchase and sale; or the lessee has a bona fide option to purchase; or every agreement of purchase and sale entered into by the developer includes a statement of the developer's intention to lease units; or written notice of a developer's intention to lease is given to everyone who has signed an agreement of purchase and sale, every registered owner and lender is entitled to vote, and no objection has been made to the court under Section 24d(2). These provisions are alternative in their application rather than cumulative.

In the present condominium market many developers are unable to sell some of the condominium units they are building. In order to have a financially viable condominium corporation, those units in the developer's ownership must be able to generate income. Sometimes, a developer's inability to pay his share of the common expenses and carrying charges because of unsold units he is forced to carry, can lead to financial hardship for both the developer and corporation. To avoid this eventuality, many developers are forced to lease the units; provided they do so in compliance with Section 24d, they are entitled to do so. It should be noted that a developer who fails to comply with subsections of Section 24d can be found guilty of an offence under Section 24e of The Condominium Act and be subject to the penalty of up to \$25,000 where a person is a corporation, and up to \$2,000 if the person is other than a corporation.

Any attempt to further restrict the developer's right to lease unsold units would be of little assistance to either the development industry or the unit purchasers. Any further restriction of this nature on the developers would create greater difficulties than it would resolve.

Speculators' leasing of units

One condominium corporation which presented a brief complained that 25 per cent of their corporation's units were owned by a group of speculators who rent out the units. The owner-occupants felt that they were severely hampered by this situation because the tenants did not have the same interest as the owners. The speculator-owners did not exercise their right to vote. Where a corporation is unwilling to draw on tenants or tenants are unwilling to participate, it is possible that the resource base for drawing members to the Board of Directors may be small. These matters combined lead to problems for the condominium corporation.

Some lenders, including government lenders, insist that the purchasers occupy their units for a fixed period of time after registration before they are permitted to sell. A purchaser's failure to occupy the unit for a specified time period constitutes a default under the mortgage. The mortgage lenders, in co-operation with the builders and perhaps, as part of the mortgage commitment, could control the bulk sale of units to any one group or individual. The controls could be beneficial to both owner-occupier and lender. Owner-occupiers will be less likely to find themselves in a corporation where large blocks of units are owned by speculators. The lender's investment is better protected in a project where the units are occupied by the owners, a situation which is more likely to produce a smooth-running corporation.

Owner-occupiers' leasing of units

Although a few condominium corporations submitted briefs which dealt with the renting of units by owners and although many of these briefs recommended some form of control over this practice, few actually suggested that owners be prohibited from leasing their units.

Although condominium ownership differs in many respects from single-family home ownership, the basic philosophy concerning the right to rent applied to both.

Recommendation No. 82:

A unit owner's right to lease his unit should remain intact.

In the three situations where the rental of a unit may occur, certain precautions are necessary to protect the interests of the condominium corporation. Many corporation's briefs suggested that a standard form of lease be recommended for all condominium unit leases to insure that all tenants were bound by their obligations and responsibilities under The Condominium Act. A standard form of lease is unnecessary, however, as Section 23(2a) states the tenants' obligations and the corporation's right to enforce them against the tenants.

To assist the condominium corporation and owners and tenants who may reside therein, certain amendments to The Condominium Act remain necessary.

Recommendation No. 83:

The Condominium Act be amended:

A. To provide that an owner who rents his unit give notice of the rental to the Board of the condominium corporation.

B. An owner's failure to notify the Board of his intention to lease his unit be the subject of a penalty under Section 24e of The Condominium Act (Maximum penalty of \$2,000 to an individual and \$25,000 to a corporation).

The recommendation should achieve a dual purpose. First, the corporation will be made aware of who is living in the project; second, the corporation will be able to communicate with tenants advising them of the guidelines within which both tenants and owners are required to live.

Some condominium corporations find rentals are not a problem because of their policy of meeting with new tenants, providing them with the condominium documentation and welcoming them into the project. Many owners in these corporations also felt confident enough in their tenants to give them proxies allowing them to vote in condominium meetings. Those who do not have such confidence in their tenants might wish to give their proxies to the Board.

Condominium corporations experiencing additional costs as a result of the extra administration and possible damage resulting from high-tenant occupancy also must be assisted.

C. The common expense fees for leased units be increased by 10 per cent.

Division of units and common elements**Assessment of leased common elements**

The Condominium Act, Section 7(11), explicitly precludes the separate assessment and taxation of common elements. Each unit is assessed as an entity with the assessed value largely a function of unit sales. To the extent that there is any market value for the common elements, it is reflected in the sale prices and thus, indirectly, in the assessment.

A recent amendment to The Condominium Act, Section 8(a)1, permits the corporation to lease part of the common elements. It is our contention that Section 7(11) of The Condominium Act overrides Section 17(2) of the Assessment Act which provides for the separate assessment of each subdivision of land. Therefore, commercial tenants in common elements are exempt from business assessment. In addition, the occupants of such leased areas cannot be enumerated for municipal election purposes.

A possible solution to the problem is to make the tenant, not the corporation, liable for payment of the business tax. An amendment to the legislation would facilitate the enumeration of the tenant for electoral and school support purposes.

Recommendation No. 84:

The Condominium Act be amended to permit the assessment of leased common elements for business tax.

Division of units

A parallel problem exists with respect to Section 24(1) of The Condominium Act. That section says that Section 29 of The Planning Act, which says that property may not be divided without going through the procedures in The Planning Act, does not apply to dealings with units and common interests. Some unit owners have interpreted this as meaning they can divide a unit and sell part of it. This is not the intent of the section which was merely to allow property to be divided by the Condominium Act, not the Planning Act.

Recommendation No. 85:

The Condominium Act be amended to clarify that division within units is subject to Section 29 of The Planning Act.

Reserve fund as an adjustable item

A properly functioning condominium corporation should be building a reserve fund from its inception to be used for the repair and replacement of capital items. The money collected for the reserve fund comes from the unit owners' common expense payments.

Once paid to the corporation, the funds become an asset of the corporation. Much controversy has arisen over whether a unit owner is entitled to an adjustment on his contribution when he sells his unit. Some owners feel that they should be entitled to a refund of their contribution from the condominium corporation itself.

Under no circumstances should a corporation repay to an owner his contribution to the reserve fund. Once those funds are received by the corporation they are an asset of the corporation and any payment for the above purpose would constitute an act beyond the scope of the corporation's authority.

The question of what constitutes an adjustable item in a real estate transaction, where the item has not been specifically mentioned in the agreement of purchase and sale, is dealt with in The Conveyancing and Law of Property Act R.S.O. 1970 C. 85. The Act does not deal with reserve fund contributions. In resale transactions, the matter of reserve fund adjustability has been determined by the lawyers representing the buyer and the seller. The seller's lawyer will endeavour to have the amount adjusted and the buyer's lawyer will attempt to ensure that it is not adjusted. If the offer of purchase and sale is silent on the matter, no adjustment should be made.

Recommendation No. 86:

The Condominium Act be amended to clarify that payments towards a reserve fund constitute an asset of the corporation and, as such, cannot be distributed to owners except on termination of the condominium corporation.

It follows from this that amounts in the reserve fund attributable to a particular unit should not be adjusted on closing. The place for a seller to recover these funds is in the sale price of his unit.

Taxation of interest earned on reserve funds

At several hearings, the question was raised about the tax status of interest on reserve funds. While all condominium corporation submissions commenting on this issue agreed that any income other than common expense payments is taxable, there was some question as to whether interest earned on reserve funds also is taxable.

The interest earned on money allocated to a corporation's property repair reserve fund is regarded by the Department of National Revenue as income earned from property. This income is taxable at the rate of 39 per cent after an initial deduction of \$2,000 is made. (Department of National Revenue, *Interpretation Bulletin IT 83*, December 28, 1972).

The corporation can escape tax liability by rebating the interest earned to the owners. While this rebate would be regarded as interest income for the owners, the \$1,000 interest deduction, for which each taxpayer is eligible, would effectively exempt most owners from the tax. The cost of administering such a rebate program, in the face of the small amounts involved for each owner, make the rebate alternative impractical for most corporations.

Several submissions requested the Study Group to recommend that the tax position of condominium reserve funds be reviewed by the federal government. A direct approach to the Department of National Revenue by condominium owners and associations is the most effective vehicle for requesting a review of the existing federal policy.

Chapter 11

Financial administration

There has been insufficient recognition by many condominium corporations of the fact that they are running significant business operations. Substantial increases in maintenance fees, unscrupulous developers and shoddy builders are not necessarily the cause of a corporation's financial problems. The key to successful management of a condominium is effective administration of the corporation's finances.

Annual budget

The centrepiece of the financial system, the annual budget, currently receives only limited attention in The Condominium Act. Throughout the Act, a number of sections imply the need for an annual budget and an expectation that the Board of Directors will prepare and administer a budget. Section 25 (1), empowers the Lieutenant-Governor in Council to "make regulations requiring and governing the accounting to members of condominium corporations in such manner and at such times as are prescribed". So far, no regulations have been made. The sole explicit reference in the Act to a corporation budget is section 24b (4), which was enacted in 1974 to eliminate "lowballing" of common expenses by developers.

Submissions from the Institute of Chartered Accountants, lawyers, management firms, developers and consumers remarked on the need for firmer guidelines in the preparation of financial statements.

The diversity of condominium corporations in size, design, and requirements of the declarations or by-laws has been a major factor inhibiting the proper analysis of budget statements. The financial reports submitted by condominium corporations varied considerably in completeness, and it is not feasible to comment on the adequacy of the statements without knowing more about the individual circumstances of the corporations.

There are, however, certain general comments that can be made regarding the coverage of financial statements. Each corporation should prepare annually a budget statement that identifies projected revenues from all sources, such as common expense charges, parking fees, lease revenue and interest. It should also identify the anticipated expenses. The major expense categories are utilities, insurance, maintenance, repairs, management fees and reserves.

Seldom will a budget year be completed with revenues and expenses behaving as forecasted when the budget is prepared, nor will the two amounts balance precisely. Consequently, there will be a surplus or deficit at the end of the year and the budget should make provision for this net cash flow or net income, either positive or negative.

The board should also, for purposes of improved control, allocate the annual revenues and expenses on a monthly or at least a quarterly basis.

The corporation should prepare a separate budget for the reserve or contingency fund that indicates how the money in the fund is earmarked or committed.

Before the annual general meeting, the board should circulate a balance sheet and a statement of income and expenses to the owners. These statements should be explained by the Treasurer and discussed by the owners at the meeting.

The balance sheet should identify major assets and liabilities for both the current operations and for the reserve fund. It is also helpful if comparative data is provided for the previous fiscal year.

The statement of income and expenses should identify any discrepancies between budgeted estimates and actual results, with explanations where appropriate.

As with the budget, boards will facilitate their control of the corporation if the balance sheet and the income/ expense statement are prepared on a monthly or quarterly basis. These statements should be audited by an independent auditor.

Condominium corporations should also consider the feasibility of appointing an audit committee to review financial statements and otherwise comment on the financial operations of the corporation. Appointment of an audit committee will facilitate involvement in the corporation's financial activities of those owners who because of their financial interest in the condominium corporation otherwise would be prohibited from acting as auditors.

Recommendation No. 87:

The Condominium Act be amended to provide:

A. That financial statements be provided to all owners prior to annual meetings.

B. By regulation, the minimum content of the statements.

Recommendation No. 88:

Condominium boards consider appointing audit committees to assist the board in managing the financial affairs of the corporation.

Reserve funds

While all condominium corporations that submitted briefs to the Study Group prepared budgets, only a minority made provision for owner contributions to a contingency or reserve fund that is used to finance the repair and replacement of major components of the common elements, such as roofs, roads, parking lots and elevators. More than one brief, in fact, was concerned with misuse of the reserve fund by the board to finance current expenses. An adequate reserve fund is essential for effective property management.

The purpose of the fund is to provide money necessary to maintain the common elements of the corporation at their original level; it is not to finance the improvement or expansion of the capital equipment owned by the corporation. If the owners agree that, for example, addition to the recreation facilities or remodelling of the entrance lobby is desirable, a separate capital reserve fund should be established.

Since the need to maintain common elements continues throughout the life of the corporation, it is necessary to maintain the reserve fund at an adequate level and replenish it when it is depleted by extraordinary expenditures. Corporations that have a reserve fund may be able to use it as security for raising a loan to finance major repairs that would otherwise seriously deplete the fund.

The reserve fund should be an integral part of the budget, the balance sheet and the income/expense statement. The budget statement for the fund should identify the capital items covered by the budget along with estimates of their replacement cost, their expected physical life and the annual allocation for the expense.

The corporations that do have reserve funds apply different formulae to fund them. Some calculate the amount to be contributed to the fund as a percentage of the total common expense requirement exclusive of reserve fund. Others base the contribution on the appraised value of the building. A third method, whereby the annual requirement of the reserve fund is based on the replacement cost of the major capital items, is the most appropriate.

While the other formulae may have the benefit of administrative convenience and do ensure that some money is available in the reserve fund, a fund which reflects the anticipated annual replacement expenditures is most likely to provide adequate funds at any one point in time.

Whichever method is selected, the owners' payments to the fund are made in the same proportion as their common expense payments. Those existing corporations without reserve funds will find it difficult to impose the "initial lump sum" contribution on the owners. The contribution should, nevertheless, be required and could be collected over a maximum twelve month period.

Recommendation No. 89:

The Condominium Act be amended to require

A. That all corporations have a reserve fund for the replacement of major capital items, the money to be deposited with a chartered bank or trust company in a trust account separate from the corporation operating accounts.

B. The developer establish the account in the corporation's name with an initial deposit equal to three months common expenses and transfer the account to the board of directors at the first annual meeting.

C. The annual contributions to the reserve fund be based on the cost and life expectancy of major capital items as disclosed by the developer or as modified by a subsequent appraisal.

Audited statements

The Condominium Act does not require the audit of financial statements of condominium corporations. While several corporations indicated in their briefs that their financial statements are audited, many more do not have their statements audited. This is a serious omission which severely restricts the ability of unit owners to obtain a comprehensive evaluation of the financial affairs of the corporation. The auditor reports to the owners on the financial operations of the corporation. He is, in effect, a financial watchdog over the Board of Directors. His background in accounting enables him to act as an advisor in preparing financial statements and managing the corporation's financial transactions.

The Business Corporations Act (sections 168, 169, 170 and 171), The Corporations Act (sections 62, 63 and 64, which are not yet proclaimed) and The Canadian Business Corporations Act (sections 155-164) all require the appointment of an auditor and deal with the responsibilities and authority of the auditor. These sections could act as a model for comparable provisions in The Condominium Act.

Audited financial statements should be required by statute. In addition to requiring the appointment of an auditor, the enabling legislation should identify who can be appointed, define the auditor's duties and describe the authority of the auditor, such as access to corporation records and attendance at board meetings. The requirement for an auditor should be optional for small corporations — those with less than 10 units where the assets controlled by the corporation are not large and the financial transactions are relatively few in number and simple in nature.

Recommendation No. 90:

The Condominium Act be amended to provide for the appointment of an auditor for each corporation of more than nine units. The auditor should have the authority and responsibility provided for auditors appointed under the Business Corporations Act.

Repair of unit

In The Condominium Act, the cost of the repair of a unit is not included as part of the common expenses. Section 16(7) states that although an owner is deemed to have consented to having repairs effected in his unit, there is no provision in the statute which enables the condominium corporation to recover the cost of these repairs; it is merely implied or included in condominium documentation (see chapter on Insurance).

Naturally the condominium corporation has the right to sue someone who causes damage but lawsuits are expensive and time-consuming.

Recommendation No. 91:

The Condominium Act be amended to allow the corporation to assess the cost of repairs, carried out by the corporation to a unit, as common expenses chargeable to the unit and collectable by way of lien.

Common expense funds

Common expenses are the costs incurred by a condominium corporation in maintaining the common elements of the property and in carrying out its legal obligations. Section 15b(4) of The Condominium Act states that all money received for the payment of common expenses relating to property shall be held in trust. The intention of this section was to ensure that a management firm receiving the money would do so on behalf of the corporation.

The possibility exists that a condominium corporation's common expense fund, if it is in the name of the management firm, might be converted to other uses. It is possible that the creditors of a management firm could seize funds in an account in the name of the management firm. It is also a matter of concern that a condominium corporation, whose funds are in an account in the name of the management firm, might be forced to bring a court action to recover monies rightfully belonging to it if the management firm were dismissed. These are not merely theoretical concerns as there have already been cases where such situations have threatened.

Recommendation No. 92:

The Condominium Act be amended to ensure that trust accounts created in accordance with Section 15b(4) are in the name of the condominium corporation.

It was suggested at public hearings that any cheque written on a corporation's trust account should be co-signed by at least one officer of the corporation. This is a sound policy.

Recommendation No. 93:

All cheques drawn on the corporation's trust account be co-signed by at least one officer of the corporation.

As condominiums have become more prevalent, a growing number of developers are including commercial space in their projects to provide amenities for the owners. Where commercial space, which forms part of the common elements of a corporation, generates income or the condominium corporation generates any income, this money becomes an asset of the corporation. Some confusion has arisen over what should be done with these funds. Should they be used to reduce common expenses, be added to reserve funds, or be paid out to the owners?

These monies should be retained in the corporation, rather than distributed to the owners. Condominium corporations should not be operated for profit purposes, as businesses are. Administratively, the paying out of this income to owners would be most difficult, and could lead to possible tax problems for the corporation and the owners.

Recommendation No. 94:

The Condominium Act be amended:

A. To define income other than income received from common expenses. (We recommend the term "common surplus".)

B. To provide that these monies be applied against either future common expense payments or reserve funds, but not be distributed to the owners unless there is termination of the condominium.

Common expense arrears

It became increasingly apparent with each public hearing that one of the major problems facing condominium corporations today is their inability to collect common expense payments assessed against unit owners.

The problems arise in three situations:

- a) a unit owner decides not to pay because he feels the corporation is not carrying out its duties.
- b) a unit owner is unable to pay his common expenses.
- c) absentee owners who either knowingly or unknowingly fail to remit their payments.

A unit owner who fails to remit common expense payments because he is not satisfied with the way the corporation is performing its duties, does so without any legal basis. There is no provision in either The Condominium Act or a condominium corporation's documents which entitles a unit owner to withhold payments for any reason. A unit owner's failure to make his payments can jeopardize the cash flow of a corporation. If a failure to pay continues for any extended period of time, this could affect the remaining unit owners.

Condominium corporations in Ontario have been experiencing sharp increases in common expense assessments over the last few years. These increases are due to a variety of factors including lowballing, higher utility costs, construction problems, or mismanagement.

These condominium owners, who are unable to meet their payments, are the cause for greatest concern. If they have little equity in their unit, they may choose to just walk away and let the mortgage company and the corporation fight it out themselves (see chapters on Lending Institutions and Housing Choice).

Priority

Under current legislation, it is assumed that a first mortgage has priority for arrears on the mortgage over the corporation for arrears in common expense payments. In circumstances where the unit owner "walks away" from his unit and there is very little equity, if any, remaining, the condominium corporation, which ranks subsequent to the mortgage on a sale, will very likely recover none of the money owing to it. This loss of revenue to condominium corporations is a serious factor affecting the other unit owners who will, as a group, have to make up the operating and reserve deficit.

Recommendation No. 95:

The Condominium Act be amended to provide that a lien for unpaid common expenses has priority over all encumbrances except municipal taxes.

The Study Group appreciates the fact that many lending institutions will not react favourably to this recommendation. In many situations, where the market is temporarily slow, this may affect the mortgagee's ability to recover the full amount owing to it. The effect of this recommendation is that future condominium projects should be financed in such a way that buyers will be required to make larger down payments to protect the mortgagee's financial position (see chapter on Lending Institutions).

Tenants

The absentee owner who doesn't pay common expenses is also a cause for concern to the condominium corporation. While the absentee owner collects rent from his tenant, the corporation may find itself in cash flow difficulties because the common expense payments are not being made.

Recommendation No. 96:

The Condominium Act be amended to provide that where a tenant occupies a unit in a condominium, and that unit is in arrears of common expense payments, the corporation shall have the right to collect the common expense payments from the tenant, who will be entitled to deduct the amount paid to the corporation from the rent he pays the owner.

Interest

At present there is no provision in The Condominium Act that interest charged on common expense arrears and costs of collecting them should be included in the amount of lien and collectable in the same manner. The documentation of a majority of condominium corporations does provide for charging interest on arrears and for recovery of collection costs. There has been great uncertainty regarding the authority of these provisions in condominium corporation documents. It is our opinion that the corporation should not be charged with the costs of collection.

Recommendation No. 97:

The Condominium Act be amended to provide:

A. That interest may be charged on arrears and the cost of recovering common expense arrears be included as a common expense attributable to that unit.

B. By regulation, the rate of interest on common expense arrears be 12 per cent per annum.

There is a danger that such an amendment will encourage certain members of the legal profession to charge very high fees to unit owners for registering liens.

Recommendation No. 98:

The law associations consider establishing a suggested maximum fee to be charged for the registration of a common expense arrears lien.

Procedure for collection of common expense payments

Before legal action is taken by the corporation against a delinquent unit owner, the corporation should adopt a consistent method of collection. The following method, as an example, could be applied:

Ten days after the date the payment is due, a notice of arrears and request for payment should be sent to the delinquent unit owner.

If no payment is made within the next 15 days, the president of the board should send a second letter by registered mail.

If payment is not forthcoming within the next 10 days, the board should advise the property manager, if any, that they wish him to discuss the arrears with the unit owner.

Continued failure to remit payment should lead the board to turn the matter over to the corporation's counsel. The lawyer should be instructed to send a letter demanding immediate payment to the unit owner. If a unit owner still fails to pay, then the solicitor or agent of the corporation should register a lien against the unit for the arrears in common expenses.

Registration of a lien

To facilitate the collection of common expenses, Section 13(4) and (4a) of The Condominium Act provide that a corporation has an unregistered lien for three months. When registered in the Land Registry Office, this lien gives a corporation protection for three months worth of common expense arrears.

In Regulation 98 of The Condominium Act, Form 10 states that a lien secures any further defaults beyond the three months referred to in Section 13 (4a).

There is a conflict between Section 13 (4a) and Form 10. Since the statute supersedes the regulation, cautious corporations should be registering new liens for arrears every three months. Once a lien is registered it should cover all future defaults.

Recommendation No. 99:

The Condominium Act be amended to give statutory authority to Form 10 of Regulation 98 which allows the lien to secure future defaults.

Section 13 (5) of The Condominium Act provides that a lien may be enforced in the same manner as a mortgage. There is no disagreement with the theory of this section. However, its wording has led to numerous inquiries as to whether foreclosure is available to enforce a lien.

The lien can be enforced by way of power of sale. What should be clarified is that the procedural steps to be applied are to be those set out in The Mortgages Act. This point should be clarified in the legislation.

Recommendation No. 100:

The Condominium Act be amended to state that the procedural steps to enforce the common expense lien are those set out in The Mortgages Act.

Expropriation

An amendment to The Condominium Act is necessary to deal with the possibility of an expropriation of some portion of a condominium corporation's common elements. Currently, the Act is unclear as to whether proceeds resulting from an expropriation should be paid to the corporation or to the unit owners in accordance with their percentage of ownership of the common elements. The mechanics of the expropriation are not of concern, for these matters are adequately dealt with in existing legislation. The Act should be amended to clarify what is to be done with the proceeds of any expropriation, since it is the property of the owners that is being expropriated.

Recommendation No. 101:

The Condominium Act be amended to provide that proceeds received as a result of an expropriation be paid to the unit owners in accordance with their percentage of ownership of the common elements as set out in the declaration.

The Condominium Act was amended in 1975 to require a corporation to supply a certificate of arrears—an estoppel certificate—to a purchaser who requested it with the consent of the owner. Several problems have arisen as a result of this amendment.

If an owner requests the certificate, in place of the purchaser, is the corporation still estopped against the purchaser? This issue has not come before the courts for determination. However, this point should be clarified in the legislation. It was also suggested that the Act be amended to require the vendor to supply the certificates. The problem with this suggestion is that if the vendor fails to supply it, the purchaser is not protected vis-a-vis the corporation.

Recommendation No. 102:

The Condominium Act be amended to provide that either an owner or a purchaser may request a certificate and once the certificate is supplied or is not supplied within the time limits in the Act, the corporation will be estopped from claiming against the purchaser where the purchaser has relied on inaccurate or insufficient information.

If accepted, the recommendation that either a vendor or purchaser be entitled to request a certificate, would leave it to the parties in the transaction to decide who, in fact, will supply it.

The Act uses the word "give" with respect to the estoppel certificate. The legal definition of the word "give" is "to provide at no charge". Many corporations however, are charging for supplying the prescribed form of certificate, as it is a means of recovering their costs and the fee is not substantial enough that the parties are prepared to delay a transaction on this account.

The options the Study Group was faced with on this issue were to make it clear that no fee would be payable for a prescribed certificate, or improve the form of certificate, or require the corporation to supply documents and set a maximum fee which could be charged.

Since the purchase of a condominium unit involves much more detailed information than a single-family home, purchasers must be supplied with, or given access to, all the relevant materials which could affect their decision.

Estoppel certificate

Included in the material to be supplied should be a more extensive certificate of estoppel. It should set out the total amount the corporation had in reserve at the end of its last fiscal year, whether any of those funds had been used in the current year, whether the corporation knows of any major repairs which are required to be carried out, and whether any substantial changes in the common elements or assets of the corporation are contemplated. Additional matters may also be necessary for inclusion, and further consideration should be given to this matter to ensure that the purchasers are fully informed.

Along with the certificate, the corporation should supply copies of the declaration, by-laws, rules and regulations, audited financial statements as of the end of the previous fiscal year and a current budget. This will help ensure that purchasers in a resale are given every protection possible.

Recommendation No. 103:

The Condominium Act be amended to prescribe:

A. A maximum fee of \$25.00 for the provision of the estoppel certificate and accompanying documents.

B. An expanded certificate.

Resale: cooling-off period

The principle of cooling-off should apply to a resale condominium unit, as a purchaser on a resale must be fully informed. However, in a resale situation, the 10 days should run from the later of signing of the agreement, or the provision of the estoppel certificate, if one is requested in accordance with the agreement of purchase and sale.

Notwithstanding the rescission period recommendation, a purchaser should not have the right to rescind a purchase agreement if he received a copy of the certificate 10 clear days prior to the execution of the purchase agreement.

The 10 day cooling-off period will be an automatic right of rescission, without the need to show a breach of the agreement, and will entitle the purchaser to the full refund of any deposit he may have made.

Recommendation No. 104:

The time period for rescission on a purchase from a developer apply to a resale (see chapter on Purchasing a Condominium).

Chapter 12

The Registrar

During the course of the public hearings, one of the most repeated suggestions was for a central government office, which would be accessible to all persons involved in condominium living and development.

The first question to ask when considering a recommendation for a Registrar of Condominiums is why is it necessary? In particular, why should the sale of a condominium unit be treated any differently from the sale of a new house? The reason that a higher degree of consumer protection is necessary when condominiums are sold is, it is alleged, that the condominium concept is more complex and less understood by the buying public. A condominium has the unique combination of units and common elements which results in two proprietary regimes in one building, a concept foreign to most home buyers. Thus, the condominium combines independence with interdependence in a way that is not present in any other kind of housing. The administrative framework for managing the affairs of the condominium (a corporation with an elected board of directors) and the necessity of a property management company to maintain the property (the costs of which are paid out of the common expenses of each owner) are both unfamiliar concepts to most purchasers. The existence of by-laws apart from municipal by-laws for condominiums, the problems of insurance for both the units and the common elements, and termination of the condominium will also be new to purchasers.

Therefore, the fact that the purchaser of a condominium is buying something completely different from anything he has ever lived in before and which is far more complex legally, requires that the relationship between the vendor and purchaser be regulated in a way that is not present in the purchase of a new house. Without better regulation, the likelihood is greater that a condominium purchaser will face some of the unpleasant experiences described in many of the briefs, that he may realize one month after moving into a condominium that he is not living in what he expected, but in something he doesn't even understand. Thus, the complexity of the transaction and the nature of the risks assumed by a purchaser demand that some greater form of protection be offered the condominium purchaser.

It could be argued that "interference" in the condominium market by a government body should not be permitted, that if a developer is willing to sell a condominium unit and a buyer is willing to buy, then the transaction should not be interfered with. Rather than the government having to regulate the market, some may contend that the forces present in an open market will ensure that fair prices and services are provided. This philosophy clearly has not worked in the condominium market, as evidenced by the briefs presented at the public hearings and by the growing media coverage of the problems in the condominium field.

Securities

Assuming, then, that a condominium purchaser requires some sort of protection, what sort of protection is required? One possibility is the treatment of the condominium unit as a security similar to those regulated by the Ontario Securities Commission.

The question of whether a condominium unit is a "security" has been discussed by numerous legal writers. Jurisdictions in the United States treat the sale of condominium units as the sale of securities by deeming a condominium unit to be a security for the purpose of regulation by a state securities or real estate commission. For example, New York State's Condominium Act deems all condominium units to be "co-operative interests in realty" within the meaning contained in New York's General Business Law, which requires that an offering statement or prospectus be filed with the Attorney-General of New York prior to the sale of certain securities, including "co-operative interests in realty". Therefore, the question of whether a condominium unit is a "security" does not arise because the legislation deems it to be a security. Florida, Virginia, and Michigan have also legislated a condominium unit to be a security or have enacted a procedure identical to that in which a security is sold to the public, therefore treating a condominium unit as a security without expressly naming it as such.

If Ontario's Condominium Act is amended so as to either deem a condominium unit a "security" or treat it in the same way as a security, should a condominium purchaser be treated any differently than the purchaser of shares of a corporation pursuant to prospectus filing and approval under The Securities Act? There is a fundamental difference between the typical purchaser of a condominium unit and a person buying shares in a corporation. A condominium purchaser is not the sophisticated kind of investor who buys shares in anticipation of future gain; rather, he is buying with the prospect of a long-term investment which he does not necessarily intend on disposing of when its value rises. In other words, the kind of risk-taking inherent in the sale of most securities is not present in the purchase of a condominium unit. In addition, purchasers of securities in corporations usually consult independent brokers to get their advice before buying shares whereas many condominium purchasers only rarely consult a lawyer as to the viability of a project before signing an agreement of purchase and sale. Therefore, the level of regulation of the vendor-purchaser relationship would have to be greater than that of the sale of shares of a corporation.

Recently in an attempt to circumvent The Condominium Act and The Co-operative Corporations Act, 1973, a few developers have begun marketing a new form of "home ownership" in Ontario. In a condominium a purchaser buys a unit and a share in the common property. In a co-operative a purchaser buys shares in a company and with those shares he gets a right to occupy a unit for as long as he owns those shares. The new scheme being sold is different in that purchasers buy a share of the property itself and receive a lease to a unit for 21 years less a day. This form of ownership combines elements of both condominium and co-operative ownership in that the purchaser owns only a proportionate interest in the whole of the property, he only has a renewable lease on his unit, and he shares in the taxes and mortgage payments covering the entire property. There is no legislative protection either to ensure that the building meets municipal standards, as would a condominium conversion before it is sold or to assist purchasers in enforcing their rights against other owners.

Neither the province nor the municipalities can approve such projects under either The Condominium Act or The Co-operative Corporations Act, 1973 and some form of disclosure is necessary for protection of purchasers.

Recommendation No. 105:

The Ontario Securities Commission treat the sale of interests in property, where the attempt is to circumvent condominium or co-operative legislation, as a security interest; and require the developer to issue a prospectus.

It is interesting to note that the Ministry of Consumer and Commercial Relations has a Foreign Land Sales section in the Real Estate and Business Brokers branch which approves the sale in Ontario of all non-Canadian properties. Members of this branch not only visit the developments but also review the documentation relating to the property before a foreign developer is permitted to advertise his property for sale in Ontario.

One particular condominium development in Florida has not been permitted to advertise or sell units in Ontario because it has an escalating lease for recreational facilities which each purchaser is bound by. We have no objection to the branch's refusal to license the developer for sales but we should point out that recreational leases, while not in use in Ontario, are not prohibited by Ontario law. We are of the opinion that the Foreign Land Sales section has greater authority to disallow sales of foreign property to Ontario consumers than the Ontario government has over a sale of Ontario property to Ontario consumers.

The Condominium Act was amended in 1975 to require that a developer provide to a purchaser copies of the declaration, description, by-laws, rules and regulations, statement of recreational amenities, budget statement, insurance trust agreement and management agreement. This has not proven to be effective as a means of making purchasers aware of the condominium concept. This is because the developer fails to supply the documents, or the purchaser fails to read the information when supplied, or the purchaser fails to see an independent solicitor before executing the agreement of purchase and sale.

In the chapter on Approval Process, recommendations have been made to reduce the time period now required to register a condominium.

As part of the new process, a Registrar's office could approve documents prior to a developer obtaining draft approval from the municipal government to ensure greater consistency and clarity in condominium documentation. Too often, purchasers buy their condominium units without an understanding of what a condominium is, how it operates and what the rules are.

Concept of full disclosure

Inherent in a Registrar's function of document approval is the principle of "full disclosure". By requiring full disclosure in developers' documents, the Registrar could attempt to ensure that purchasers are informed of what they are buying and that there is no misrepresentation or fraud on the part of the developer. A procedure such as this would not impede developers who deal honestly and fairly with the public, but would only adversely affect unscrupulous developers, a result which companies in the former category would not object to because it is the latter category of developers that can give condominiums a bad name.

In examining full disclosure, it is helpful to look at the experience of other jurisdictions where this approach has been successful. One example of the full disclosure approach to condominium sales is in the New York State legislation. As noted earlier, condominium units are deemed to be "cooperative interests in realty" and therefore fall under the New York General Business Law. Under this law, it is illegal to sell "cooperative interests in realty" unless and until an offering statement or prospectus is filed with the Attorney-General's office, which ensures that the required documentation is included in the application and issues a letter indicating "deficiencies" which must be answered before the developer's plan will be approved. However, if the documentation is in order and the information required to be in the prospectus is present, the Attorney-General must file the prospectus. The statute gives the Attorney-General very narrow grounds to reject the offering plan, and any offering plan that is approved must contain the following statement on the outside cover in bold type: "The Attorney-General Of The State Of New York Does Not Pass On The Merits Of This Offering". The

courts in New York State have also concluded that the purpose of the legislation is to provide full disclosure to potential purchasers, rather than have the government "pass on the merits" of the offering statement.

The assumption that full disclosure is an adequate means of protecting consumers has been followed in the Florida and Virginia acts as well. However, Virginia does move a step beyond mere full disclosure in that it gives the following power to its Real Estate Commission:

"Whenever the Commission finds that the significance to purchasers of certain information requires that it be disclosed more conspicuously than by regular presentation in the summary of important considerations, it may provide, by order, that a summary statement of the information shall be underscored, italicized and/or printed in larger or heavier or different colour type than the remainder of the public offering statement."

Such a summary statement helps combat one of the problems of relying on full disclosure. That is, as the terms and conditions of sales become more complex, the transactions may exceed the understanding of the average purchaser and of lawyers unfamiliar with the nature of condominiums, thus causing full disclosure to lose its effectiveness.

Michigan seems to be part way between a full disclosure position and a regulatory position. The Michigan Horizontal Real Property Act forbids the sale of condominium units by a developer prior to the issuance by the Michigan Corporation and Securities Commission of a permit to sell. The Act sets out the following approach that the Commission must take for each application:

"Upon receipt of the application for a permit to sell apartments in any condominium project the commission shall promptly investigate, and if satisfied that the proposal to sell is consistent with the master deed as approved and recorded for the project and clearly and fairly represents the property offered for sale and *will not tend to work a fraud or imposition on purchasers or the public*, shall issue its permit to sell."

Of all jurisdictions treating condominium units as securities, the system which is the most "regulatory" is that found in California. California's Subdivided Lands Act deems a condominium to be a "subdivision" and requires that a prospective developer file certain documents with a Real Estate Commission before offering the units for sale. No person can offer any parcels of a subdivision for sale until a "public report" is issued by the Commission, and a copy of the Commission's report must be given to a prospective purchaser prior to the execution of a binding contract. The Act sets out grounds upon which a Commission may refuse to issue a public report:

"(a) Failure to comply with any of the provisions in this chapter (The Subdivided Lands Act) or the regulations of the commissioners pertaining thereto;

(b) The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees;

(c) Inability to deliver title or other interest contracted for;

(d) Inability to demonstrate that adequate financial arrangements have been made for all offsite improvements included in the offering;

(e) Inability to demonstrate that adequate financial arrangements have been made for any community, recreational or other facilities included in the offering;

(f) Failure to make a showing that the parcels can be used for the purpose for which they are offered;

(g) Failure to provide in the contract or other writing the use or uses for which the parcels are offered, together with any covenants or conditions relative thereto;

(h) Agreements or bylaws to provide for management or other services pertaining to common facilities in the offering, which fail to comply with the regulations of the commissioner;

(i) Failure to demonstrate that adequate financial arrangements have been made for any guaranty or warranty included in the offering."

Thus, under the California system, the sale of a condominium is regulated by what can best be described as a form of a "feasibility and fairness" test. Such a system provides not only that a purchaser must receive full disclosure of what he is getting into, but the purchaser is also assured that what he is buying has been investigated by a Commission and found to be reasonable, fair and feasible.

Lack of standard provisions in documents

Much of the documentation currently governing Ontario's projects is ambiguous and misleading. Some examples of document deficiencies are — the provision for elevator maintenance as a common expense in a low-rise project; lack of clarity as to the responsibility for repair between the corporation and unit owners; and provisions regarding leasing, animals and use of premises which may be in violation of The Condominium Act.

Another major problem lies in the fact that although certain forms of documents are commonly used, such as those of the Urban Development Institute and more recently those of the Canadian Bar Association, there is no standard condominium declaration or by-law.

Because of the variations in the wording used in condominium documents, each corporation is required to seek interpretations of their documents on an individual basis. This leads to confusion, as can be seen in the recent cases brought before the courts on document interpretations, such as *York Condominium Corporation No. 42 vs. Melanson* involving a pet by-law. Standard provisions, where possible, coupled with an approval process for documents, as outlined earlier, will eliminate provisions in the documents which are inconsistent with the Act or inappropriate for the project (for example, elevator and balcony maintenance in a townhouse development). This will be of great assistance to corporations in simplifying the administration of their affairs.

Some examples of items which could be dealt with in a standard declaration are items (a) to (d) inclusive of Section 3 (1) (see chapter on Condominium Corporation section on voting majorities). The use of this approach would require developers' solicitors, for example, to complete the blanks with respect to ownership interests and contribution to common expenses in the declaration. The standard declaration and by-law would still allow room for additional provisions, providing they were only necessary to accommodate the individual features of the project.

Since members of boards of directors are often inexperienced in interpreting these legal documents, it becomes a matter of trial and error for many. Most people reading the documents assume that since a provision is included and the project has been approved and registered in a Land Registry Office, it must be valid. The truth is that, at present, no government office reviews the documentation for validity.

Recommendation No. 106:

The Condominium Act be amended to prescribe certain sections of declarations and by-laws.

For the standard documents to be effective, they must be coupled with a document approval process within government.

Establishment of a central office is perhaps the most significant and far-reaching recommendation in this report. Unlike any existing provincial government body, such an office would provide central services and information or direction to those in the condominium field, thus enabling it to properly deal with consumer and industry inquiries that are currently being directed through various ministries at various levels.

Recommendation No. 107:

The Condominium Act be amended to establish a central organization called The Office of the Registrar of Condominiums.

Recommendation No. 108:

The Registrar of Condominiums approve all condominium documents which a developer is required to provide to a purchaser under Section 24b.

Review procedure

This review process would involve two elements. The first would be a review of the documentation to ensure fair and accurate disclosure; the second would be to ensure that the summary statement of those elements of the project which make it different from other condominiums is provided to purchasers.

The Registrar's review of the first element of disclosure statements would check the following items from the developer to ensure full disclosure, removal of inconsistencies, and obtaining of statements from the developer and professionals he employs that the documents presented to the Registrar represent full and accurate disclosure of those matters which will affect the purchasers in that project: declaration, description, by-laws, rules and regulations, budget statement, recreational amenities statements, maintenance schedule, life span table of capital equipment, insurance trust agreement, management agreement, and agreement of purchase and sale.

Some of this review may involve questions of feasibility. As an example, there is the question of the occasional use of different percentages applicable to a unit for common expense contributions and common element interests. Section 9(17) provides that a judgment against the corporation is a judgment against each owner at the time the cause of action arose in the same proportions as specified in the declaration for sharing common expenses.

However, under section 9(18) a judgement in favour of the corporation is an asset and by section 9(16) is shared in the same proportions as the common interests. Where common interest and common expense allocations to a unit differ, an owner would be liable for a different proportion than he would benefit from.

A similar problem exists with regard to the provision in section 7(9) of the Act. There a unit owner may discharge his unit from an encumbrance which attaches to all the units by paying his share as determined by his proportionate share of the common expenses. As he is really benefiting his share of the property, it should be his share of the common interests.

Thus the Registrar may require proof that there is an overriding interest when the developer proposes to use different percentages on each schedule.

The Registrar will not bear responsibility for the accuracy of the material.

Recommendation No. 109:

The Condominium Act be amended to provide for:

A. A fine of \$50,000 for misrepresentation in material provided the Registrar.

B. A specific right to unit owners and the condominium corporation to sue the developer for misrepresentation.

The second element of the Registrar's disclosure statement review would be to ensure that the developer prepares a summary disclosure statement outlining those matters which distinguish this corporation from others.

For example, is there a sales quota in the mortgagee's commitment?

Are pets allowed?

Are the recreational facilities a unit, part of the common elements or shared?

Is the superintendent's suite a unit or part of the common elements?

Who has the right to assign parking spaces?

Are parking spaces units, exclusive use common elements or common elements?

Is the purchaser required to occupy the unit?

Is the builder registered with the HUDAC New Home Warranty Program?

Are the boundaries of the units and common elements fixed or will they require amendment because custom work is being done?

The fine for failure to notify the condominium corporation of the renting of a unit is a maximum of \$2,000 for an individual and \$25,000 for a corporation.

Although the initial approval of documentation will be at an early stage in the process, amendments to the documents may be required during the course of a project's construction. Any amendments to the documents filed with the Registrar will require the Registrar's approval. If the Registrar, in his discretion decides that the amendment is substantial, he may refuse to allow the change, or he may require the developer to notify all those with whom he has entered into agreements of the change and advise them that they have the right to terminate their agreements. If the Registrar decides that the change is not substantial, it will be processed with notice to the owners. A refusal by the Registrar to approve documents is subject to appeal to the tribunal.

Prior to the issuance of the building permit, the developer will only be able to enter into a non-binding reservation agreement with a purchaser, which the purchaser can terminate at any time up to 10 days after he receives his copy of the filed documents. After the documents are approved by the Registrar, the municipality can issue the building permit (see chapter on Purchasing a Condominium.)

Recommendation No. 110:

The Condominium Act be amended:

A. To prohibit a developer from entering into a binding agreement of purchase and sale or any agreement in which he is entitled to retain a prospective purchaser's deposit, until the Registrar's approval has been issued.

B. To require the developer to notify purchasers that they have the right to terminate their agreements with the developer if the developer's documents do not receive approval.

Recommendation No. 111:

The Condominium Act be amended to provide that a developer who fails to comply with the Act be subject to a fine.

When the developer has the building permit he will be in a position to build. Upon completion, to the satisfaction of the Ministry of Consumer and Commercial Relations and the municipality, registration can take place. It should be noted that the municipality's final approval must be made in accordance with the site plan agreement. By having the developer disclose his intention and enter into a site plan agreement, the municipality will be required to issue final approval on the basis of the developer having first met the terms of the site plan agreement (see chapter on Approval Process). The actual registration of the condominium will be effected by filing the declaration and description in the local Land Registry Office and with the Registrar of Condominiums office.

Information role

To provide a central organization which will be able to monitor and assist those in the condominium field, the Office of the Registrar of Condominiums should be charged with numerous responsibilities, including maintaining the following information: all condominium corporations in Ontario, type of development, number of units in each development, members of the boards of directors, municipal address of each corporation, address of service, if different, of each corporation.

It is difficult and time consuming at present to locate the several hundred condominium projects now in existence in Ontario. The Study Group had to combine searches in the local land registry offices with searches of the municipal assessment rolls in an attempt to notify the corporations of the public hearings in the various areas. Even at this time, there is no complete address list of all of Ontario's condominium corporations and their locations.

The Registrar would supervise an annual filing by all condominium corporations, including a list of directors and their addresses and any changes in the address for service. The Registrar will also have the right to request proof that audited statements have been provided by the corporations in accordance with the Act.

The Registrar would have the role of information-gathering and dissemination for various reasons: so that condominium owners could communicate with other condominium corporations; so that those doing business with condominium corporations could gain some knowledge of the project; so that those involved in the condominium field could have access to general condominium information; so that the Registrar might better deal with matters in which there may be a need to contact a member of a particular condominium corporation; and most importantly so that government could communicate any changes in laws and regulations governing condominiums.

Recommendation No. 112:

The Condominium Act be amended to provide that a condominium corporation's failure to file information with the Registrar will make it subject to a penalty up to a maximum of \$2,000.

Those working within the office would be responsible for communication with owners, developers, property managers, lending institutions and others involved in condominiums, both within and outside Ontario. It should improve the condominium environment through various forms of education and, where applicable, by suggesting policy changes and legislative amendments. The Registrar's office should also include a central resource centre.

Effective public relations forms an integral part of the administration of the Acts and programmes, including such duties as:

1. communicating any changes resulting from the Study Group's recommendations
2. establishing productive relationships with industry associations
3. informing the general public and condominium community members via the media, pamphlets, speeches, and educational materials of all important aspects of condominium living.

Transition

In light of the recommendations made in this report, The Condominium Act of Ontario should undergo major revisions; a new statute may be necessary. The Office of the Registrar of Condominiums will have a significant function during the transition period.

In the chapter on Condominium Corporations, there is a recommendation that many of the provisions which are currently included in condominium documents be either prescribed in standard documents in the regulations of The Condominium Act or included in the legislation itself. Acceptance of this recommendation will require major revision to the documents of the condominium corporations already in existence, because new statutory or prescribed provisions will result in conflicts.

Revisions in the legislation will only benefit existing condominium corporations if they have the ability to amend their declarations and by-laws to conform also to the standards forms proposed by the Act. When enacted into legislation, these recommendations will greatly assist Ontario's condominium owners in the day-to-day problems with which they are confronted.

A period of grace of two years should be established within which those condominiums created before the date of the new amendments would have an opportunity to amend their declarations with a more than 70 per cent vote of owners present or by proxy, so that they can adopt the new standardized documentation. Those corporations in existence, however, would not be entitled to remove provisions in their declaration dealing with ownership of the common elements.

Recommendation No. 113:

The Condominium Act be amended to provide that for the purpose of changing the provisions of an existing declaration to the standard provisions in the Act a special vote of 70 per cent of the owners be allowed, and for the by-laws 50 per cent of the owners be allowed.

Once approved by the Registrar, existing condominiums will automatically be governed by the new Condominium Act. Corporations unwilling to make these changes will remain governed by their old documents, and will only benefit from the new provisions of the Act where compulsory.

Recommendation No. 114:

The Condominium Act be amended to provide that the Registrar must approve these amendments to declarations and by-laws.

Dispute resolution

At present where a dispute arises between a unit owner and the corporation or between two unit owners, arising out of the act, declaration, by-laws or rules and regulations, the parties are required to resort to the courts for a resolution under Section 23 of The Condominium Act.

A review of Ontario's condominium case law shows that private individuals are not availing themselves of the relief available. This is the case because the individual owner simply cannot afford the costs of having the courts decide the matter, nor the delays that going to the courts entail.

Condominium owners feel a great need for a non-adversarial dispute resolution mechanism. The benefit of such a system would be a forum to which the parties can come for assistance without the need for lawyers, legal documents, an adversary approach, lengthy delays and high costs.

It is obvious that dispute resolution through the courts is neither practical nor satisfactory for Ontario's condominium owners. Since condominium living is communal in nature, the requirement that owners and boards meet each other in a courtroom to settle their differences creates unnecessary tension and hostility between people who must continue living together.

The Ontario and Federal governments have encouraged Ontario residents to buy condominium homes. Most of these purchasers bought condominiums without understanding that they were part of a unique community, and that if differences arose which could not be settled amicably they were going to have to face a court battle. Because condominium units are usually built with high densities and require close social interaction, problems which might cause some discomfort between neighbours in single family or semi-detached homes become magnified in the condominium environment.

Most purchasers of condominium units fit into two categories, those who believe that their home is "their castle" to do with as they please and those who think everything will be looked after by their landlord. It takes compromise and adjustments before both groups come to the realization that condominium ownership is a balance between these two extremes.

Unfortunately, some purchasers never reach this stage and for the other members of the community, life can be intolerable.

The close proximity of condominium dwellers who are not "getting along" necessitates arriving at a speedy resolution of disputes. Unlike a rental where a noisy neighbour can be evicted, there is no such remedy in a condominium. An owner who fences off part of the common elements and thereby restricts the access of the other owners to those common elements, will create antagonism and must be dealt with speedily. These types of incidents are minor examples of the day to day problems facing the typical condominium owner.

Dispute resolution in other jurisdictions

Many other jurisdictions have dispute resolution systems for condominiums. The most extensive are those in British Columbia, Florida, and New South Wales. Several American jurisdictions are examining the mechanisms for resolving disputes with even greater intensity as it appears to be the most complicated problem facing condominium communities.

In Canada, British Columbia is the only jurisdiction which has any form of dispute settlement. B.C. allows condominium corporations the power to fix and collect fines for the contravention of the by-laws or regulations, and provides that where a dispute arises between an owner and a corporation or between two or more unit owners in respect of any matter relating to the corporation, the corporation or any owner may refer the matter to arbitration. There are four kinds of disputes which can be referred to arbitration: 1) failure to contribute to common expenses; 2) levying fines for breach of the by-laws or rules and regulations; 3) liability for damage to the common elements or other assets of the corporation; 4) decisions of the corporation.

The hearing held by the arbitrator is informal and evidence which is otherwise not acceptable in a court of law may be admissible at the hearing. Each party is given adequate opportunity to present evidence and rebut the other party's evidence. The hearing itself is open to members of the corporation.

The arbitrators may make whatever award they consider just and equitable, including an order in the nature of a mandatory or prohibitive injunction, or for payment of damages. The arbitrators also make an order in respect of the contribution of each of the parties to the costs of the arbitration and remuneration of the arbitrators.

The Florida Condominium Act created an advisory board, the purpose of which is to assist and advise in residential condominium problems and to arbitrate controversies between unit owners and their corporations.

One of the most detailed administrative procedures for resolving condominium disputes is the scheme that exists under the New South Wales Strata Titles Act. There are three levels involved: a hearing officer, an appeal tribunal and the courts.

A hearing officer has the power to prohibit someone from doing a specified act, and to make orders for the settlement of a dispute or the rectification of a complaint. The hearing officer may refer the application directly to a tribunal for any of the following reasons: (1) the application raises matters of legal complexity; (2) the importance of the subject-matter of the application or the possibility of the frequent recurrence of like applications warrants a reference to a tribunal; (3) any other reason which convinces the Commissioner that the application should go to the tribunal. The hearing officer has a wide power of investigation and can enter the property of the corporation involved for the purpose of carrying out any investigation. The decision of the hearing officer is based on the written submissions he receives and the investigations he

makes. The hearing officer's decision may be appealed to the tribunal. The tribunal is required to make a thorough investigation, but need not hold a hearing prior to deciding. The decision of the tribunal may be appealed to the Supreme Court of New South Wales on a question of law. Any person who contravenes an order of a hearing officer or a tribunal shall be fined \$100 and a further \$10 a day, up to a maximum fine of \$500. An applicant who uses the courts rather than the dispute resolution system must pay the defendant's court costs.

To assist the Ontario condominium owner in dealing with disputes, a tribunal should be created. Such a body would be non-adversarial and informal in nature, and those coming before the tribunal could do so without legal assistance and be assured that rules of evidence and formal procedure would not govern the hearing.

Recommendation No. 115:

A. The Condominium Act be amended to provide a system of dispute resolution structured as a two-tiered system composed of local hearing officers and a tribunal.

B. The administrative responsibility for the system should rest with the Registrar of Condominiums. (The Registrar should be responsible for processing the applications for hearing and keeping accurate records of the decisions made.)

Since there are condominium corporations in almost every medium to large-sized city in Ontario, there will be a need for personnel in four or five major centres to deal with the disputes on either a local or where necessary regional basis. Since many areas do not have a need for full-time personnel we recommend that these personnel be utilized on a part-time basis. These Hearing Officers must be fully conversant with the principles underlying condominium living and must have a thorough knowledge of The Condominium Act, declarations, by-laws, rules and regulations. They could hear matters in person or make decisions based on written applications and responses by the parties. Local hearing officers are the key to successful condominium dispute resolution.

The Tribunal would consist of three persons, with at least one being a lawyer and all knowledgeable in the condominium field. The Tribunal would be the body of highest authority in any condominium dispute, those involved must first appeal to it before going to the courts.

C. The jurisdiction of the Hearing Officers and the Tribunal encompass the right to make decisions with respect to the collection of common expenses, the enforcement of the Act, declaration, by-laws and rules and regulations, damage to the common elements, and the right to award costs.

A Hearing Officer should have the right to refer matters directly to the Tribunal, where the matters involve legal complexities or where the settlement of the matter by the Tribunal would prevent the same issue arising before several Hearing Officers or where the Hearing Officer feels the matter would be better handled by the Tribunal's expertise.

Any application for a hearing be submitted to the Registrar together with a fee of at least \$25.00.

D. Decisions of the Hearing Officers and the Tribunal be enforceable in the same manner as a decision of the courts.

A dispute resolution system will assist condominium owners and boards of directors with issues which are currently insoluble. A properly functioning, well-staffed, two-tiered mechanism is the most appropriate body for dispute resolution.

Transitional office

In order to facilitate an orderly transition to a new condominium act and a new framework within which the condominium field will be operating, an administrative office should be established to prepare the way for the official office of the Registrar by:

1. compiling a list of all existing condominium corporations: the type of development and number of units, board of directors, municipal addresses, and addresses of service.
2. preparing information to be available to the condominium community on changes in legislation and policy emanating from this report.
3. developing a resource centre.
4. creating the administrative framework for the Condominium Tribunal and training its staff.
5. preparing standardized documents and improved forms for disclosure, including prescribed detailed budget statements, recreational and amenities statements, insurance forms, estoppel certificates, and other forms which may need improvement.
6. establishing and formulating any programs, administrative methods and procedures within the framework of the accepted recommendations, to carry out effectively the intent and purpose of the recommendations.

Recommendation No. 116:

Before the legislation creating the Office of the Registrar comes into effect, an administrative office be established that will eventually become the Registrar's office.

Location within the government

The Registrar's office requires adequate staff and funding to ensure that it effectively carries out those functions which this Report recommends it undertake. No purpose can be achieved by creating a Registrar's office which does not have the resources to perform properly.

Representations were made that the jurisdiction for condominiums should be in the Ministry of Housing. Since the Ministry of Housing, through the Ontario Housing Corporation and the Ontario Mortgage Corporation, is involved in building and financing condominium projects, there is an inherent conflict of interest. It is preferable that The Condominium Act be administered by the Ministry of Consumer and Commercial Relations. It has consumer experience in the area; it already has local offices in which condominiums are registered; and most importantly, it administers The Condominium Act, which is evolving into a consumer protection statute, rather than a registration statute.

The Office of the Registrar of Condominiums would be somewhat similar in its scope to the Ontario Securities Commission. Since the Ministry of Consumer and Commercial Relations has experience in the securities area and in business practices, it is the most appropriate location for the Office of the Registrar of Condominiums.

Recommendation No. 117:

The Registrar's Office be located in the Ministry of Consumer and Commercial Relations and that, in its establishment, the Ministry look to its other consumer protection bodies and the Ontario Securities Commission for guidelines and assistance.

Chapter 13

Termination

No condominium corporation in Ontario has yet been terminated. However, an exploration of the provisions in The Condominium Act indicates that termination under the current procedures would create a number of serious problems. Changes are thus required to prevent such future problems. For the purpose of clarity in this chapter, owners before registration of the notice of termination are referred to as "unit owners" and owners after termination will be referred to as "co-owners".

There are four provisions in The Condominium Act which would give rise to the termination of a condominium corporation:

- a) Under Section 18, where there has been substantial damage to 25 per cent of the buildings and the required majority of owners do not vote for repair, the condominium corporation must register a notice of termination.
- b) Under Section 19, where sale of the property has been authorized, registration of the deed terminates the condominium corporation.
- c) Under Section 20, termination may be authorized by a vote of the required majority of owners (usually 80 per cent ownership of the common elements) and the consent of all the persons having registered claims against the property. A notice of termination is then required.
- d) Under Section 21, the condominium corporation, any owner, or any person having an encumbrance against a unit may apply to the Supreme Court of Ontario for an order terminating the condominium.

Each of the four methods of termination has its own requirements and procedures.

Termination under Section 18

Notice of termination under Section 18 is signed by the duly authorized signing officers of the condominium corporation. It is required by the Act to be registered within 10 days of the expiry of the 60-day period in which the vote to repair was to have been held.

In practice, the only mechanism for forcing such a registration is Section 23 of the Act which allows, among others, any owner or any person having an encumbrance against a unit to apply to a county or district court for an order directing performance of a duty.

Upon termination, several situations arise:

- 1. The unit owners become tenants in common of the land in the same proportions as their common interests are determined in the condominium declaration. In essence, this means that each owner becomes a co-owner with a share of the ownership of the entire property.

This change of status might not present difficulties in a small condominium, but the disposal of the entire property would require the signature of each property owner on the deed. In a large project this would render the sale of the property impractical.

An owner could sell his share in the property to a purchaser, but it is unlikely that a market would exist given the related problems.

An interesting problem occurs if one of three highrise buildings in a condominium were destroyed and because of apathy or difficulty in organization, the owners fail to vote for repair and the condominium is terminated. The unit owners of the two undamaged buildings may find themselves no longer owners of their units, but merely co-owners of the entire property. The loss of unit ownership may prevent resales and cause other inconvenience, which probably would not be adequately compensated in conventional insurance coverage.

- 2. Claims against the land made before the registration of the condominium are as effective as if the condominium had not been registered.

"Claim" is defined as a right, title, interest, encumbrance, or demand of any kind affecting land. Presumably "claim" would include the construction mortgage where it had not been discharged and, perhaps, easements over the common elements that were created prior to the registration of the condominium.

If the construction mortgage is effective against the land, then:

- a) the co-owner who had the right to pay his proportionate share of the encumbrance, i.e. to relieve himself of the liability when he was a unit owner, no longer has that right; and
- b) the status of the co-owner is uncertain because Section 18 provides that the construction mortgage now attaches to all the land. The unit owner who paid cash for his unit or otherwise discharged the interest of the construction lender in a unit mortgage now finds the property subject to the construction mortgage.

It may be that the registration of a partial discharge of the construction mortgage of one unit would allow the courts to treat the remaining portion of the construction mortgage as if it had been created after registration of the condominium, but, such a solution is not apparent in the Act.

The co-owner who has paid off his mortgage may not have any document to register showing that he is exempt from foreclosure or sale by the lender.

Solicitors should be warned that in the provisions in many offers to purchase, the construction mortgage need not be discharged for a number of days after closing. This may allow some danger to a client who has paid off his unit mortgage.

3. Encumbrances such as unit mortgages or executions,¹ created after the registration of the condominium, are treated as claims against the interest of the co-owner and have the same priority as they had prior to the condominium's termination. Again, the prime obstacle for the claimant is the difficulty in disposing of his claim. Who would buy a mortgage as an investment if the asset was secured only by an interest that was difficult to dispose of?

4. Claims, other than claims securing the payment of money, created after the registration of the condominium are extinguished. Such a claim might be a commercial lease of a portion of the common elements such as that held by a tuck shop.

Termination under Section 19

Section 19 terminates the condominium automatically upon registration of a deed of sale of the property executed by all the owners and having the release of all persons having registered claims against the property. The effects are similar to those in a termination under Section 18, except that claims against the property do not survive the sale.

Termination under Section 20

Section 20 allows a vote of those owners who own a minimum of 80 per cent of the common elements (or such greater percentage as specified in the declaration) to authorize termination, provided that the consent of all the persons who have registered claims against the property is obtained.

However, the notice of termination requires *all* the members of the corporation to sign, which negates the value of having a less than 100 per cent owner vote required for termination.

The notice of the termination must be registered by the condominium corporation, but no time limit is given. Upon registration the same consequences occur as under Section 18.

Termination under Section 21

Upon application to the Supreme Court of Ontario, it may make an order terminating the condominium if the court is of the opinion that the termination would be just and equitable. The court may include in the order any provisions that it considers appropriate in the circumstances, such as reconstitution of the corporation in a different form or a scheme to ensure that all creditors are paid. The court may include in its order the automatic consequences of termination occurring under Section 18 and 20, but is not obliged to do so.

Best to terminate under Section 21

If the condominium is terminated under Section 18, 19 or 20, the power of the court to make other provisions does not exist. The power to make other provisions is important, as that is the only method in the existing Act to allow for the provision of a trustee or liquidator to manage the property or its distribution.

Any condominium corporation approaching termination would be best advised to apply under Section 21 for a court-ordered termination, rather than under either Sections 18 or 20. The corporation would cite as a reason for the application the circumstances permitting the termination under the other sections of the Act.

Termination provisions

Questions arise as to the efficacy of these various termination procedures regarding solvency, management and possession.

Solvency

Under The British North America Act, jurisdiction over bankruptcy and insolvency rests with the Federal Government. This severely circumscribes the authority of a court acting under the provisions of a provincial statute to make orders regarding the distribution of the condominium corporation's assets in the event there were insufficient funds to meet the demands of creditors.

Section 9(10) of The Condominium Act provides that the assets of the corporation on termination shall be used to pay corporation creditors. But, this is of no assistance if there are insufficient assets (a general discussion of the rights of creditors is found elsewhere in the report). There is no provision to distribute the assets after termination, even if the condominium corporation were solvent.

Recommendation No. 118:

The province request the federal government to clarify the situation with regard to the distribution of assets of an insolvent condominium corporation.

Management

As there is no body to enter into contracts for the management and maintenance of the property or to pay the common bills such as utilities, voluntary termination must, in most cases, be accompanied by a sale of the property to someone interested in using the property for rental purposes or for redevelopment.

If, as previously suggested, the situation exists where a substantial portion of the dwellings remain undamaged and the condominium is terminated involuntarily under Section 18, then some provision must be made to manage the property, at least until the entire property can be sold or final disposition made. One possible arrangement would be the reconstitution of the undamaged property as a new condominium corporation.

Possession

Unless the court makes an order under Section 21, there will be some difficulty with regard to the rights to possession of the units. Tenants leasing units from unit owners, presumably, have had their leases extinguished, but there exists no procedure for eviction. Mortgagees who would otherwise foreclose have no rights to possession of a defaulting unit owner's unit and so have lost much of their security.

¹judgements of a court to be enforced by the sheriff

Winding-up

The procedure for administering solvent properties that is closest to solving the problems of the condominium situation is found in Section 161 of The Co-operative Corporations Act. It is, in essence, the same as the scheme of The Business Corporations Act.

In a voluntary termination of a co-operative a general meeting of the corporation votes to terminate and appoints one or more persons — who may be directors, officers or employees — as liquidators of the estate and effects for the purpose of winding up its affairs and distributing its property. The liquidators may bring any action, carry on business, sell the property, sign all documents, raise money on the security of the corporation and do anything else necessary to wind up the corporation.

The procedure cannot be adopted without change because of important differences between condominiums and co-operatives:

1. the condominium is more likely to be the place of residence of the owner and therefore require more day-to-day administration and owner participation, whereas most co-operatives are places of business.
2. the real estate is owned by the condominium unit owners and not by the condominium corporation. The real estate is also more likely to be a large portion of the assets of the unit owner and therefore requires more expeditious administration.

Recommendation No. 119:

The Condominium Act be amended:

A. To repeal the provisions in the Act for automatic termination of the condominium corporation in the event of a failure to vote for repair after substantial damage.

B. To require the condominium corporation to repair unless there is a vote by 80 per cent of the owners to terminate the condominium corporation.

It makes sense to wind up before termination while there is still an organization, rather than after. The procedures for liquidation of the property can be imported from The Co-operative Act with those changes required because of the nature of a condominium corporation.

Recommendation No. 120:

The Condominium Act be amended to provide that upon a vote to terminate:

A. The board of directors be the liquidators of the condominium corporation.

B. The board as liquidators continue to be subject to the existing requirements for removal or election of directors.

C. The liquidators be empowered to cancel or re-negotiate all existing contracts relating to the corporation or units, including leasing of units, paying all debts and entering into requisite arrangements with the municipality for the conversion of the property to a rental project or as necessary.

D. The liquidators be granted a power of attorney, on behalf of the unit owners and all persons with claims against units, to dispose of the unit owners' interests and to consent to substantial changes in the common assets of the corporation.

E. Notice of the liquidators' appointment be registered in the common elements index and property parcel register.

F. Other condominium corporations engaged in the use of joint recreation or other facilities, with the corporation being terminated where such facilities require a financial contribution from the condominium being terminated, be permitted to apply to the court for an order governing the disposal or other use of such facilities.

G. The condominium be terminated on registration of a notice that all creditors had been paid, obligations settled and all assets of the corporation had been disposed of.

Re-constitution

There may be difficulties in disposing of the property in a "winding-up" and it may be more prudent to reconstitute the condominium corporation after disposal of the damaged property or settlement of the problem, which created the failure of the original condominium corporation.

Recommendation No. 121:

The Condominium Act be amended to provide that:

A. The liquidators appointed under the "winding-up" arrangements be empowered to apply to the court for an order permitting them to amend the declaration and by-laws so as to vary the number of units in the condominium and their appurtenant common interests.

B. The court may deem insurance money or money paid by the liquidators to unit owners as full satisfaction of any claims or rights of such unit owners.

Chapter 14

Housing choice and government programs

Condominium living was designed originally for those individuals who wanted to experience "maintenance-free, headache-free" home ownership; and, for those individuals who enjoyed the amenities and freedom associated with renting but who wished the equity in real property investment. The condominium concept was originally designed with private streets, private services, private recreational facilities, and its own board of directors to create somewhat of a country club atmosphere. In the late 1960's and very early 1970's, people purchased a unit in the full awareness that maintenance-free home ownership meant higher operating costs, and during these years few complaints were heard.

In 1973, the picture changed substantially. Housing costs had soared. The probability of ownership of single-family housing was dim for many people. As a result, the various levels of government initiated programs that either directly assisted individuals with the purchase of their first home, or gave incentive grants to municipalities to allow lower-cost housing within their jurisdictions. Some of these programs are briefly described:

High ratio mortgages

In the early 1970's, the Ontario Housing Corporation (OHC), through its former agency, Housing Corporation Limited (now independent of OHC and named Ontario Mortgage Corporation) provided high ratio mortgage financing for a large number of condominium units. High ratio financing provides a mortgage of up to 95 per cent of the selling price of a unit.

In many cases, only minimum construction standards were required, with consequent high maintenance costs for purchasers. Contributing to this situation was the fact that OHC limited prices at which the units could be sold by the builder. Also, OHC inspected only for the purpose of calculating the amount of mortgage money to be given to the builder and did not inspect particularly for quality.

As there was no limit on the maximum incomes of purchasers, some purchasers with minimum incomes were inconvenienced or were forced to sell their units because of common expense increases, but, the majority of purchasers were able to absorb increases and, in varying degrees of success, provided competent administration.

OHAP

In the middle 1970's the Ontario Housing Action Program (OHAP), offered the speeding up of government planning processes, per unit grants to municipalities that accepted moderate income housing, and mortgage financing through the Ontario Mortgage Corporation. OHAP is provincially sponsored but not related to OHC. The intention of OHAP was to induce builders to make a certain percentage of their housing units available to persons of moderate income.

Moderate income housing was designed for those families who could not qualify for assisted rental housing, but whose income was below that considered necessary to purchase on the open market. It was calculated that a great proportion of the population desiring housing fell within this category. The OHAP program was successful in certain areas around Metropolitan Toronto and Ottawa. Most moderate income housing built under this program was condominium.

AHOP

The federal government participated, through its Central Mortgage and Housing Corporation (CMHC), in financing condominiums in the province to a much lesser extent than did the Ontario Mortgage Corporation. But, CMHC's reliance on design standards similar to OHC's made apparent similar problems in their condominiums.

The most important federal initiative, however, has been the Assisted Home Ownership Program (AHOP) offered by CMHC.

Under AHOP, a purchaser who buys a previously qualified unit may receive a grant from CMHC, plus a loan to reduce the effective rate of mortgage interest, thus helping many lower income people to purchase a unit. There are price ceilings, which vary by area, on the units to qualify them for eligibility. For example, in Metropolitan Toronto, the 1974 ceiling was approximately \$43,000 and in 1976 it was \$47,000.

The federal and provincial governments have recently announced a piggy-back program which will further drive down the income requirements to purchase. The same criteria for the AHOP program will determine eligibility. The province will integrate an additional subsidy into the same program.

During its five year course, the subsidy diminishes annually. At the end of the five years, interest begins to run on the loan and the loan must be paid back in instalments. If a sale occurs, the balance of the loan becomes due.

The theory behind the program is that income levels will rise, enabling the purchaser to pay back the loan.

The disadvantages of the program for the condominium buyer are several:

The AHOP subsidy is not available to purchasers until after they receive title to their units, and many purchasers may be severely affected by the high occupancy rent they are required to pay until a deed is received.

AHOP piles up a rapid debt at a time when income levels are not rising rapidly in the income ranges being served. A person who was not able to pay a current mortgage rate at the time of purchase, was not only expected to pay that rate in five years but to pay back the loan as well.

AHOP encourages lower income persons to purchase condominium units meeting AHOP qualifications. Consequently, this put people with the least financial flexibility into condominium units.

AHOP ignores the common expense portion of the condominium purchaser's financial obligations. Therefore, the purchaser often winds up exceeding the conventional guideline of 30 per cent of gross income to carry the unit, a fault also shared by other lending institutions in their economic analysis of condominiums. A high risk of default may be the result.

There are also social disadvantages to the program. Both the provincial and federal governments have encouraged home ownership through the claim that equity appreciation is probable. The subsidy imposes unfair competition with owners of similar units not sponsored by government programs who wish to resell their units.

As well, by encouraging large numbers of low income purchasers who will be facing economic problems resulting from increasing common expenses and AHOP loan repayment, the program puts heavy financial pressure on the condominium corporations involved as they try to meet their bills with declining revenues. In the current market, even prior to repayment of the AHOP loans, there have been indications of purchasers surrendering deeds to mortgagees because the purchasers were unable to keep up mortgage and common expense payments.

The foregoing disadvantages of the current program need correcting.

Recommendation No. 122:

The AHOP program be amended:

A. *So that the subsidies are available from the time of occupancy.*

B. *To include common expense payments in the eligibility requirement calculation.*

FHAP

The Federal Housing Action Program (FHAP) is designed to provide grants to municipalities as an incentive to allow better residential densities at affordable prices. The AHOP price ceilings apply. Municipalities receive \$1,000 for every eligible unit to offset the loss of municipal tax revenue on smaller units. To meet the density and price ceiling requirements, the most eligible forms of development are currently townhouse condominiums. It is expected that this trend will continue.

Municipal government attitudes

Since most of the programs just described imposed unit price ceilings, higher densities became a prerequisite. Although a number of municipalities in the early 1970's realized their responsibilities for providing affordable housing, many were not receptive to innovative housing development forms which would have required moving away from traditional planning and engineering standards to allow a more flexible approach.

Condominium appeared to be the answer to this dilemma since condominium proposals met the requirements of both the developer and the municipalities, in that high densities and lower service standards could be achieved without the municipality being responsible for maintenance cost. Consequently, condominium developments flourished in 1974, 1975, and 1976, providing home ownership to those who would not otherwise have been able to afford a home (see Chart 8).

Some people are now living in condominiums not because it is their choice but because it is the only home they can afford. To such people, a private road which must be maintained by them is not a status symbol, but an expensive headache.

Leasehold condominiums

In 1974, the province attempted to lower the land component of the cost of condominiums by removing the restriction in The Condominium Act that condominiums be built only on freehold land; the government also set up a procedure in Section 26 of the Act whereby a condominium could be registered on a lease-hold interest. It was hoped that a long-term lease would provide a method of spreading land costs over a long time period and thereby lower monthly costs.

The province then commissioned a study to determine exactly what legislative protection was needed to prevent abuse. The study, called The Leasehold Condominium: Problems and Prospects, found that even if abuses were prevented, the problems of financing and deterioration of the buildings near the end of the lease were sufficient to render impractical the concept of condominiums on leasehold land. No action has yet been taken on this report.

Recommendation No. 123:

The Condominium Act be amended to remove the section permitting condominiums on leased land.

Alternative forms of housing

A number of alternative housing forms other than condominiums are available to provide a realistic choice for those in the low and moderate income brackets. Some of these, such as zero lot line development, are not new and have proven to be very successful for both municipalities and owners.

Chart 8

Number of Condominium Corporations in Ontario by Year Registered

YEAR OF REGISTRATION	LOW RISE		HIGH RISE	
	PROJECTS	PERCENTAGE	PROJECTS	PERCENTAGE
Up to and including 1970	38	4.51%	13	1.54%
1971	39	4.63%	16	1.90%
1972	33	3.91%	30	3.56%
1973	55	6.52%	13	1.54%
1974	100	11.86%	34	4.03%
1975	131	15.54%	51	6.05%
1976	160	18.98%	60	7.12%
1977 (as of March 31, 1977)	53	6.29%	17	2.02%
	Total Low Rise		Total High Rise	
	609	72.24%	234	27.76%

Zero lot line developments provide individual homes fronting on public roads. The unit can be placed anywhere on the lot, even against the property line, allowing very economical use of the land and higher densities than in a standard subdivision.

Good co-operation between the developer and the municipality is essential to ensure sensitive and imaginative siting of buildings. Such developments can provide unique and architecturally interesting communities because they deviate from the standard 66-foot road allowances and do not have a uniform street scape, but, since each site is different, requiring individual attention, many municipalities have not been receptive. There appears to be security for municipalities in rigid standards and a distrust of precedent-setting.

Since the advent of condominium townhouses, a great deal of attention has been given to on-street townhouses which are not condominiums. Such on-street townhouses can be built on short-length streets with reduced road allowances to provide housing at similar densities and similar prices to condominium townhouses. The difference is that, like zero lot line housing, each homeowner receives title to both his land and his unit, and the unit fronts onto a public road. This has some definite advantages.

The first is that no formal community board of directors or organization is necessary. Those not interested in a high level of community involvement can enjoy their own home and maintain it as desired without relying on formalized cooperation.

Another paramount advantage is that the unit fronts onto a public road. Many of the problems raised in the hearings involved private roads. A private road means that certain services, normally provided by the municipality, are provided and paid for by the condominium corporation. These include road maintenance, garbage collection, snow removal and repairs and maintenance of underground services. For a purchaser who did not wish a private street to begin with, a condominium owner can find it difficult to understand why he must pay for these essential services.

The chapter on municipal services provides a more detailed discussion and recommendations relating to the provision of such services. A great number of submissions received by the Study Group emphasized that people would have preferred to pay more initially for a home on a public street rather than buy into a condominium with private streets.

Because of the concern over lack of municipal services, the Borough of Etobicoke has assumed the internal roads of a condominium project.

Some members of the development industry felt that on-street townhouses located on short streets (P-loops or cul-de-sacs) with an allowance of 45 to 50 feet, together with reduced front yard standards, could be placed on the market at from \$2,000 to \$3,000 per unit above the price of accepted condominium townhouses. The initial extra cost would far outweigh the inflationary spiral of maintenance fees which include property management, bookkeeping and maintenance costs for work that can be done by an individual property owner himself. Amortized over 25 years, this increased cost would be minimal on the mortgage carrying costs. Since 72 per cent of all Ontario registered condominiums are in the townhouse category, this appears to be a workable alternative.

Recommendation No. 124:

Federal and provincial programs, such as AHOP-HOME, be directed towards encouraging alternate forms of housing, such as zero lot line or on-street townhousing, and that municipalities be more receptive to innovative housing forms.

Prior to our public hearings, the Ministry of Housing published a report on "Urban Development Standards". This report clearly indicates that there are realistic means to cut down on per unit costs without cutting down on safety standards. The report also lends credibility to the argument that if municipalities are receptive to innovative forms of housing development, then methods exist to keep costs down. Affordable homes could thus be put on the market without the need for a large number of public assistance programs. It is unfortunate that greater support by municipalities has not been given to the conclusions of that report. Alternative housing forms within similar price ranges must be produced.

Recommendation No. 125:

Municipalities endorse the "Urban Development Standards" report published by the Ministry of Housing to assist in the reduction of housing costs, thereby increasing the scope of housing choice.

Adult accommodation

Aside from the assistance programs, another important aspect of housing choice involves adult-only accommodation. In a number of briefs submitted, concern was expressed that there was no legislative provision for all-adult buildings. A number of senior citizens, for example, wanted a choice of accommodation, and wanted to sell their homes and move into all-adult buildings.

Recommendation No. 126:

Legislation be enacted to provide a legislative basis for all-adult buildings.

The Condominium Study Group concluded from its hearings that the condominium concept is, in fact, a preferred choice of housing accommodation for many. But in order to keep it desirable, the unit must be purchased by choice, not necessity.

Summary of recommendations

Chapter 1 — Approval process

Recommendation No. 1:

The new approval process:

If an approved zoning by-law is in place, and the site is on a block of land described on a registered plan of subdivision, then:

- A. The builder-developer discloses his intention to the municipality to develop a condominium project.
- B. The builder-developer applies to the municipality for a site plan agreement under Section 35a of the Planning Act, and a building permit.
- C. The municipality processes the site plan application to ensure that all municipal standards and policies are adhered to.
- D. The municipality enters into a development agreement with the builder-developer setting out the conditions and standards of development. Levies should be determined at this stage, if they have not already been determined at the plan of subdivision stage.
- E. The builder-developer submits documentation for a disclosure statement to the Registrar of condominiums.
- F. Prior to the issuance of the building permit, the purchaser may only enter into a non-binding reservation agreement which the purchaser can terminate at any time up to 10 days after he receives his copy of the documents as approved by the Registrar.
- G. After the site plan agreement is finalized and notice of approval received from the Registrar of condominiums, the municipality issues the building permit. The building permit becomes the draft approval.
- H. The builder-developer starts construction.
- I. The builder-developer submits his proposed declaration and description to the Ministry of Consumer and Commercial Relations for a review as to the registerability of the documents.
- J. The municipality receives the "J" form from the Ministry of Consumer and Commercial Relations and any other clearances necessary as a result of conditions imposed in the development agreement.
- K. The municipality, once satisfied that all the terms of the agreement have been carried out and after a detailed inspection of the site, endorses the final plans for registration. Upon completion to the satisfaction of the Ministry of Consumer and Commercial Relations and the local government, registration can take place.
- L. The actual registration of the condominium will be effected by filing the declaration and description in the local land registry office and the Registrar of condominiums.

Recommendation No. 2:

Section 29 of The Planning Act be amended:

- A. To require that where no municipal structure exists, the Minister of Housing be the approval authority.
- B. To require that where a municipality has no official plan and cannot use Section 35a of The Planning Act, the project be part of a registered plan of subdivision approved under Section 33 of The Planning Act.

Recommendation No. 3:

Section 35a of The Planning Act be amended:

- A. To define "development" in subsection (1), and amend the definition of "redevelopment" to provide that conversion-to-condominium applications be covered.
- B. To empower the municipality to impose such conditions as the Minister of Housing may impose under Section 33(5), subject to the appeal provisions of Section 33(7).
- C. To empower the municipality to require that an application for first registration in the land titles system, or for certification of title, be commenced prior to issuance of a building permit.
- D. To clarify that the municipality has the authority to impose standards of width and construction material on all internal roads.
- E. To remove the 25-unit minimum in the municipality's authority to require architectural drawings.
- F. To enable the municipality to establish planning, engineering and construction standards which will minimize long-term maintenance and operation costs.

Recommendation No. 4:

Section 24 of The Condominium Act be amended to reflect the new system.

Chapter 2 — Construction

Recommendation No. 5:

The Ontario Building Code be reviewed for the purpose of:

- A. Establishing a standard of design and workmanship desirable for a building retailed to the public, as distinguished from the minimum requirements necessary for the safety of occupants.
- B. Establishing standards on the lifetime costs of maintenance and repair.
- C. Establishing standards on sound-proofing.
- D. Ensuring energy-efficient design, including increased insulation.
- E. Establishing the Building Code as a minimum construction standard, with the municipality being given the power to establish higher standards.

Recommendation No. 6:

The Province of Ontario establish training standards for municipal inspectors and provide municipalities with funds or educational programs which would allow the municipalities to meet those standards.

Recommendation No. 7:

The builder acquire warranties, where possible, in a form capable of transfer to the condominium corporation and, on the election of a board of directors by the unit owners, turn the warranties over to the condominium corporation.

Recommendation No. 8:

The Ontario New Home Warranties Plan be amended:

A. To empower the warranty corporation to act as a trustee to borrow money from a lender who has unadvanced mortgage funds on a condominium project. Such a loan to take priority over claimants whose claims are registered subsequent to the registration of the mortgage.

B. To empower the warranty corporation to use such money for the completion of units or common elements not covered by the warranty and any remainder of such money for full or partial satisfaction of warranty completion and repair costs.

Recommendation No. 9:

The warranties on the common elements take effect from the date the builder has ceased to have control of the condominium board of directors.

Recommendation No. 10:

The Government of Ontario guarantee loans through private lending institutions to condominium corporations not covered by the HUDAC New Home Warranty Program for the correction of construction deficiencies.

Recommendation No. 11:

The municipality require "as built" plans to be filed with the municipality on completion of construction. All such plans be made accessible to representatives of the condominium corporation in question.

Chapter 3 — Municipal policy and standards**Recommendation No. 12:**

A. Municipalities provide a clear definition of "single-family" in their zoning by-laws and enforce the provision. In the absence of a definition of "single-family" in a condominium declaration, a condominium corporation should be allowed to import a definition under the municipality's maintenance and occupancy by-law.

B. As an alternative, municipalities provide restrictions on the maximum number of persons per bedroom or per floor space under their powers to pass maintenance and occupancy by-laws.

Recommendation No. 13:

Municipalities enforce their site plan agreements according to Section 35a of The Planning Act.

Recommendation No. 14:

Municipalities adopt consistent standards relating to width and construction of internal roads, internal services and other facilities required for condominium developments. Water and sewer easements follow the road wherever possible.

Recommendation No. 15:

Municipalities have formal guidelines dealing with matters such as parking requirements, service facilities and design criteria.

Recommendation No. 16:

Municipalities develop policies and guidelines for condominiums and adopt them as an amendment to their official plans. These policies address all matters listed under subsection (2) of Section 35a of The Planning Act and consider the following:

A. The size and complexity of condominium corporations; apartment and townhouse condominiums to be treated differently.

B. Parking, both in the number of spaces per unit and guidelines for the location of visitor parking areas.

C. Whether or not internal streets in new and existing condominium projects should be public streets.

D. The services the municipality intends to provide and whether or not they will be provided on a charge-back system.

E. Design standards for condominiums if different from rental accommodation.

F. Designs that treat the issue of private spaces with more sensitivity.

G. Encouraging garbage storage areas adjacent to public roads so that they are accessible to municipal trucks.

Recommendation No. 17:

Municipalities adopt an amendment to their official plan to provide policies on condominium conversion, including the following considerations:

A. Conversions have the same standards as new condominiums.

B. The issues of:

i) The overall mix of rental and freehold accommodation in the municipality.

ii) The availability of rental accommodation similar to that proposed for conversion, in the general neighbourhood, for those existing tenants who wish to remain in rental accommodation.

iii) The vacancy rate for rental accommodation in the municipality.

C. The process that conversion applications should go through; e.g. that the developer be required to indicate the quality of the building and its life expectancy.

D. Detailed inspection before recommending draft approval.

Recommendation No. 18:

The Ministry of Housing have its appropriate officials organize a series of workshops for municipalities across the province to discuss the new approval procedure and the methods available to administer it.

Chapter 4 — Municipal services**Recommendation No. 19:**

The Municipal Act be amended:

A. To define a condominium road.

B. To enable municipalities to provide road maintenance, including snowplowing, on condominium road.

C. To enable municipalities to levy fees for that purpose, if necessary.

Recommendation No. 20:

A. Municipalities consider the possibility of assuming as public roads the roads internal to condominiums when a development is first considered.

B. The Ministry of Housing grant approval of municipal status for roads of less than 66 feet that are on condominium property, wherever feasible.

Recommendation No. 21:

Government-guaranteed loans be made available to condominium corporations for the purpose of bringing roads up to municipal standards.

Recommendation No. 22:

Section 354(1) 112 of The Municipal Act be amended to specify that, in the case of a condominium, the "owner" is a person delegated by the board to act for the purpose of this section notwithstanding that the car owner is a unit owner in the condominium project.

Recommendation No. 23:

- A. A condominium corporation experiencing policing difficulties contact its local police department to set up a meeting to discuss mutual concerns.
- B. The Ministry of the Solicitor General, with the assistance of the Registrar of condominiums, provide material on condominiums to boards of police commissioners.

Recommendation No. 24:

Municipalities exercise greater development control over private condominium roads, and give consideration to the problem of waste collection at the design stage.

Recommendation No. 25:

The Municipal Act be amended to enable municipalities to levy fees, if necessary to condominium corporations for special garbage collection.

Recommendation No. 26:

All legislation regarding municipal services on condominium roads exculpate the municipality from any action on the part of the condominium corporation for damage to private property.

Recommendation No. 27:

Municipalities ensure that maintenance and repair are facilitated by insisting that pipes follow the road.

Recommendation No. 28:

Legislation be amended to enable municipalities or their public utilities commissions to maintain and repair water and sewer pipes on condominium property and charge a fee, if necessary.

Recommendation No. 29:

Legislation be amended to require, in the interest of public safety, municipalities or their public utilities commissions to maintain condominium fire hydrants, and to allow them to charge a fee for such service, if necessary.

Recommendation No. 30:

- A. Municipalities and public utilities commissions insist on individual metering for all new condominiums.
- B. Municipalities and the province consider assisting condominiums to convert from bulk to individual metering.

Recommendation No. 31:

Municipalities draw up a service agreement with each condominium corporation, to be renewed annually. This agreement to outline exactly what services the municipality would provide and what, if anything, the condominium corporation might pay for these services.

Chapter 5 — Lending institutions**Recommendation No. 32:**

No liability be placed by legislation on lenders for the quality of design or construction.

Recommendation No. 33:

Lenders include 50 per cent of the estimated annual common expenses in the gross debt service ratio of principal, interest and taxes in determining a purchaser's eligibility for financing, or other percentage the lender deems appropriate given the nature of the proposed common expenses.

Recommendation No. 34:

Lenders distribute advances on the construction mortgage among the unit mortgages on registration.

Chapter 6 — Condominium insurance**Recommendation No. 35:**

The Insurance Act be amended to give the condominium corporation an insurable interest in the property.

Recommendation No. 36:

The Mortgages Act be amended to deem the mortgagee of a condominium unit to have waived its right to have insurance proceeds applied to the mortgage unless the unit owners vote against repair. Such a provision be retroactive and all mortgages which might be invalid, by reason of a lack of waiver, be validated subject to this amendment.

Recommendation No. 37:

The Insurance Act be amended to ensure statutory conditions for condominium insurance policies providing:

- A. The insured as the condominium corporation and the unit owners from time to time.
- B. The exclusive right to the condominium corporation to adjust or amend.
- C. The condominium policy be primary insurance not to be brought into contribution with unit owners' insurance policies on their units.
- D. The insurer's right to repair be waived in the event of damage leading to the termination of the condominium corporation.
- E. A breach of any condition in the policy not disentitle the insured to collect in the event the property must be repaired.
- F. Cancellation be on 60 days notice to the condominium corporation and insurance trustee, if any.
- G. Such other conditions as the superintendent of insurance deems advisable.

Recommendation No. 38:

Condominium corporations obtain all risk, stated amount replacement cost insurance, including replacement to any increased construction standard required by law.

Recommendation No. 39:

All condominium insurance policies be reviewed in the light of the discussions in the chapter on Insurance

Chapter 7 — Purchasing a condominium**Recommendation No. 40:**

The Ontario government provide assistance to consumer groups and the development industry in formulating courses to educate both sales personnel and consumers in the field of condominiums.

Recommendation No. 41:

The Registrar of the Commercial Registration Appeal Tribunal take more vigorous action in enforcing the provisions of The Real Estate and Business Brokers Act.

Recommendation No. 42:

The Condominium Act be amended to provide that:

A. Budget statements supplied to purchasers be dated so that purchasers will know that the costs shown are estimated as of a particular date. Budget statements must also include the type, frequency and level of service to be provided.

B. Increases in hydro, heating fuel and other utilities, not including cable TV, not be required to be guaranteed by developers for the first year after registration, as these are costs over which the developer has no control.

C. A corporation be provided with a civil cause of action where a budget statement supplied by a developer proves to be unrealistic.

Recommendation No. 43:

The Condominium Act be amended to provide that in any transaction where the purchaser does not receive prescribed security under the Act, all cash paid via deposit or downpayment towards the purchase price of a unit not be payable to the developer. The Act should provide that these monies are to be made payable to the developer's solicitor to be held in trust.

Recommendation No. 44:

The Condominium Act be amended to provide that the agreement of purchase and sale include a provision that, where it is necessary for the vendor to reduce the mortgage committed to a unit, the purchaser need not deliver to the vendor that portion of the downpayment attributable to such reduction until the purchaser has received evidence of the reduction.

Recommendation No. 45:

The Condominium Act be amended to provide that the money paid by a purchaser on account of the purchase price of a condominium unit (excluding occupancy payments and money for which the prescribed security has been given) be held in trust until a deed in registerable form has been given to the purchaser in accordance with the agreement of purchase and sale.

Recommendation No. 46:

The Condominium Act be amended to include a general provision that the Act will apply, notwithstanding any agreement or waiver to the contrary.

Recommendation No. 47:

The Condominium Act be amended to provide that:

A. The purchaser of a residential unit have the right to rescind a purchase agreement, without incurring any liability for breach thereof within 10 days from the later of the date the purchase agreement is executed or from his receipt of all the documents which the developer is required to provide.

B. A purchaser not have the right to rescind the purchase agreement if 10 clear days prior to the execution of the agreement he received all the documents the developer is required to provide.

Recommendation No. 48:

The Condominium Act be amended to provide that the portion of the adjustments to cover reserve funds or common expenses be payable directly to the corporation.

Recommendation No. 49:

The Condominium Act be amended to delete the requirement that the agreement of purchase and sale specify that rent money not be credited to the purchase price and the matter be left to the disclosure statement.

Recommendation No. 50:

A. Purchasers in possession under an interim occupancy arrangement remain as tenants under The Landlord and Tenant Act, but that certain changes be made in their rights.

B. The Condominium Act be amended to provide that notwithstanding the status as tenants of purchasers in possession:

a. The builder be required to provide only those services that the condominium corporation is to provide in accordance with the documents the builder must provide purchasers.

b. The responsibility of the builder for repair and maintenance of the building be that of the future condominium corporation.

c. The builder have the same right of entry as the future condominium corporation.

d. The builder be allowed to withhold consent to an assignment of the interim occupancy agreement or to a subletting where this would interrupt the flow of mortgage advances.

Recommendation No. 51:

The Condominium Act be amended to provide that the purchaser and the developer abide by rules and regulations proposed for the corporation and that such rules be enforceable by the purchaser against other building occupants just as if the rules were rules of a registered condominium corporation.

Recommendation No. 52:

Condominium purchasers in a particular project join together to create an interim association. This association should then select an individual whom the developer could include on his board of directors immediately upon registration. The developer should include at least one purchaser-occupier on the board of directors as soon as possible after the registration of the corporation.

Recommendation No. 53:

The Condominium Act be amended to provide that a notice of intent to register a condominium be registered when the building permit is issued and such notice be signed by all existing encumbrancers. These and all subsequent encumbrancers must be deemed to have consented to the registration of a condominium, conforming with the information filed with the Registrar of condominiums.

Chapter 8 — Property management**Recommendation No. 54:**

The Registrar of Condominiums assist the condominium property management industry in determining the proper content and duration for a prescribed course or choice of courses in the field of condominium property management.

Recommendation No. 55:

A. A code of ethics be established by representatives from the property management industry and condominium associations in conjunction with the Registrar of condominiums.
B. Such guidelines apply to all firms offering commercial condominium management services in the Province of Ontario.

Recommendation No. 56:

Representatives of the property management industry in conjunction with the Registrar of condominiums work to prepare legislation to enable the property management industry to become a self-regulated and self-disciplining body.

Recommendation No. 57:

In the absence of action taken by the property management industry towards self-regulation, The Condominium Act be amended to require that all individuals and companies engaged in condominium property management for a fee be registered with the Registrar of condominiums.

Chapter 9 — Property taxation**Recommendation No. 58:**

Property tax rebates or tax credits not be given retroactively to the owners of condominium units who did not have appeals outstanding in December, 1975.

Chapter 10 — The condominium corporation**Recommendation No. 59:**

The Condominium Act be amended to require that a developer or his representatives provide the following items at the turnover meeting of the corporation referred to in Section 9b:

A. Warranties and guarantees on all "equipment" for the common elements or any other item for which the corporation is required to provide maintenance or repair.
B. As-built architectural, structural, engineering, electrical, mechanical and plumbing plans, plus underground site services, site grading, drainage, cable television and landscaping, which are part of the condominium property and for which the board has responsibility of repair and maintenance.

C. Copies of all contracts and agreements entered into by the developer which affect the corporation, including service contracts, management contract, site plan agreement, insurance agreements and easements or licenses.

D. A financial statement prepared no earlier than 30 days prior to turnover for the period from registration to not less than 30 days prior to the date of the statement. The statement should include the depreciation period of capital equipment for the common elements, budget, balance sheet of income and expense, and all financial records necessary to prepare the financial statements.

E. A table showing the maintenance responsibilities as a schedule.

F. Bills of sale or transfers for all furnishings, equipment, etc. which are not part of the common elements.

G. Current documentation — declaration, description, by-laws, rules and regulations.

H. Minute books of corporation and corporate seal.

Recommendation No. 60:

The Condominium Act be amended to define the word "records" to include items in Recommendation No. 59, but not limit the definition to those items. In addition to items in Recommendation No. 59, the definition of "records" should include any financial reports supplied by the corporation's manager, minutes of annual meetings and board meetings, any amendments to documentation passed by the corporation, and all notices of meetings.

Recommendation No. 61:

The Condominium Act be amended to require that every condominium corporation have a corporate seal.

Recommendation No. 62:

The Condominium Act be amended to provide that no contract entered into by the developer's board be for longer than 18 months from registration unless ratified by a board elected by purchasers. This, however, should not replace the owner's right to terminate a management contract pursuant to Section 15(a).

Recommendation No. 63:

The Condominium Act be amended to provide that board members be exculpated for any act done in good faith in the carrying out of their duties as specified in the declaration and by-laws.

Recommendation No. 64:

The Condominium Act be amended to provide that the condominium corporation may act as a representative of the unit owners with respect to the common elements, the corporation's assets and two or more of the units in the corporation, notwithstanding that the corporation was not a party to the contract against which the action is brought.

Recommendation No. 65:

The Condominium Act be amended to provide that the condominium corporation may be sued as representative of the unit owners as a class.

Recommendation No. 66:

The Condominium Act be amended to provide that a judgement against a condominium corporation is deemed to be a judgement against the owners at the time of judgement.

Recommendation No. 67:

The Condominium Act be amended to permit a board of directors to give notice to owners by delivery of the notice to the unit. The requirement of service by prepaid mail or personally would apply only when service is being effected on a mortgagee or owner who has notified the corporation of his address and is not in occupancy.

Recommendation No. 68:

The corporation provide with the notice of meeting any background information regarding decisions being put to the owners for approval or a vote.

Recommendation No. 69:

The Condominium Act be amended to clarify that:

A. Where a member of the board of directors is removed pursuant to Section 9 (7a) that this not be considered a vacancy in the board under subsection (7).

B. When a board member is removed in accordance with this section 9(7a), the new member be voted into office by the owners in compliance with the corporation by-laws dealing with election of directors.

Recommendation No. 70:

The Condominium Act be amended to use only the term "owners" and not "members" in specifying rights and obligations.

Recommendation No. 71:

The Condominium Act be amended to provide that the board of directors of a condominium corporation may determine what constitutes a "substantial" change in common elements or assets.

Recommendation No. 72:

The Condominium Act be amended to provide that:

A. Voting be on the basis of one vote per unit, rather than on the total of percentage interests.

B. Where there is more than one owner of a unit, only one owner can vote.

Recommendation No. 73:

The Condominium Act be amended to require notice to encumbrancers of an application to amend the declaration or description because of a manifest error or inconsistency.

Recommendation No. 74:

The Condominium Act be amended to eliminate the inclusion in the declaration of those items which would be better dealt with in the Act or the by-laws.

Recommendation No. 75:

The Condominium Act be amended to provide that the voting majority to amend by-laws be reduced to a vote in favour of the by-laws or amendments thereto of more than 50 per cent of the owners of all the units.

Recommendation No. 76:

The Condominium Act be amended:

A. To remove the requirement that a provision regarding the enacting of rules and regulations be included in the by-law.

B. To provide that all corporations have the power to pass rules and regulations which are reasonable and consistent with the Act, declaration and by-laws of the corporation.

Recommendation No. 77:

The Condominium Act be amended:

A. To eliminate Section 10(1)(B), regarding by-laws governing the use of units for the purpose of interference with the use and enjoyment of common elements and the units.

B. To allow rules "respecting the use of the units and common elements for the purpose of preventing unreasonable interference with the enjoyment of the units and common elements".

Recommendation No. 78:

The Condominium Act be amended:

A. To permit the board of directors to make rules and regulations.

B. To eliminate the requirement that 50 per cent of the owners vote in favour of a rule or regulation.

C. To require the board to notify unit owners 30 days in advance of a rule or regulation becoming effective and, where necessary, to explain the effect of the rule or regulation.

Recommendation No. 79:

The Condominium Act be amended to reduce the percentage required to call a meeting of owners for any purpose to 15 per cent of unit owners.

Recommendation No. 80:

The Condominium Act be amended to require a vote of more than 50 per cent of the owners of all the units to overturn a decision of the board of directors concerning rules and regulations.

Recommendation No. 81:

The Condominium Act be amended so that the signing officers of the corporation can certify as to the authorization by the required majority of a sale of part of the common elements and sign the deed or transfer resulting from this.

Recommendation No. 82:

A unit owner's right to lease his unit should remain intact.

Recommendation No. 83:

The Condominium Act be amended:

A. To provide that an owner who rents his unit give notice of the rental to the board of the condominium corporation.

B. An owner's failure to notify the board of his intention to lease his unit be the subject of a penalty under Section 24e of The Condominium Act.

C. The common expense fees for leased units be increased by 10 per cent.

Recommendation No. 84:

The Condominium Act be amended to permit the assessment of leased common elements for business tax.

Recommendation No. 85:

The Condominium Act be amended to clarify that division within units is subject to Section 29 of The Planning Act.

Recommendation No. 86:

The Condominium Act be amended to clarify that payments towards a reserve fund constitute an asset of the corporation and, as such, cannot be distributed to owners except on termination of the condominium corporation.

Chapter 11 — Financial administration**Recommendation No. 87:**

The Condominium Act be amended to provide:

- A. That financial statements be provided to all owners prior to annual meetings.
- B. By regulation, the minimum content of the statements.

Recommendation No. 88:

Condominium boards consider appointing audit committees to assist the board in managing the financial affairs of the corporation.

Recommendation No. 89:

The Condominium Act be amended to require:

- A. That all corporations have a reserve fund for the replacement of major capital items, the money to be deposited with a chartered bank or trust company in a trust account separate from the corporation operating accounts.
- B. The developer establish the account in the corporation's name with an initial deposit equal to three months common expenses and transfer the account to the board of directors at the first annual meeting.
- C. The annual contributions to the reserve fund be based on the cost and life expectancy of major capital items as disclosed by the developer or as modified by a subsequent appraisal.

Recommendation No. 90:

The Condominium Act be amended to provide for the appointment of an auditor for each corporation of more than nine units. The auditor should have the authority and responsibility provided for auditors appointed under The Business Corporations Act.

Recommendation No. 91:

The Condominium Act be amended to allow the corporation to assess the cost of repairs, carried out by the corporation to a unit, as common expenses chargeable to the unit and collectable by way of lien.

Recommendation No. 92:

The Condominium Act be amended to ensure that the trust accounts created in accordance with Section 15b(4) are in the name of the condominium corporation.

Recommendation No. 93:

All cheques drawn on the corporation's trust account be co-signed by at least one officer of the corporation.

Recommendation No. 94:

The Condominium Act be amended:

- A. To define income other than income received from common expenses.
- B. To provide that these monies be applied against either future common expense payments or reserve funds, but not be distributed to the owners unless there is termination of the condominium.

Recommendation No. 95:

The Condominium Act be amended to provide that a lien for unpaid common expenses has priority over all encumbrances except municipal taxes.

Recommendation No. 96:

The Condominium Act be amended to provide that where a tenant occupies a unit in a condominium, and that unit is in arrears of common expense payments, the corporation shall have the right to collect the common expense payments from the tenant, who will be entitled to deduct the amount paid to the corporation from the rent he pays the owner.

Recommendation No. 97:

The Condominium Act be amended to provide:

- A. That interest may be charged on arrears and the cost of recovering common expense arrears be included, as a common expense attributable to that unit.
- B. By regulation, the rate of interest on common expense arrears be 12 per cent per annum.

Recommendation No. 98:

The law associations consider establishing a suggested maximum fee to be charged for the registration of a common expense arrears lien.

Recommendation No. 99:

The Condominium Act be amended to give statutory authority to Form 10 of Regulation 98 which allows the lien to secure future defaults.

Recommendation No. 100:

The Condominium Act be amended to state that the procedural steps to enforce the common expense lien are those set out in the Mortgage Act.

Recommendation No. 101:

The Condominium Act be amended to provide that the proceeds received as a result of an expropriation be paid to the unit owners in accordance with their percentage of ownership of the common elements as set out in the declaration.

Recommendation No. 102:

The Condominium Act be amended to provide that either an owner or a purchaser may request a certificate and once the certificate is supplied or is not supplied within the time limits in the Act, the corporation will be estopped from claiming against the purchaser, where the purchaser has relied on insufficient or inaccurate information.

Recommendation No. 103:

The Condominium Act be amended to prescribe:

- A. A maximum fee of \$25.00 for the provision of the estoppel certificate and accompanying documents.
- B. An expanded certificate.

Recommendation No. 104:

The time period for rescission on a purchase from a developer apply to a resale.

Chapter 12 — The Registrar**Recommendation No. 105:**

The Ontario Securities Commission treat the sale of interest in property where the attempt is to circumvent condominium or co-operatives legislation as a security interest; and require the developer to issue a prospectus.

Recommendation No. 106:

The Condominium Act be amended to prescribe certain sections of declarations and by-laws.

Recommendation No. 107:

The Condominium Act be amended to establish a central organization called The Office of the Registrar of Condominiums.

Recommendation No. 108:

The Registrar of Condominiums approve all condominium documents which a developer is required to provide to a purchaser under Section 24b.

Recommendation No. 109:

The Condominium Act be amended to provide for:

- A. A fine of \$50,000 for misrepresentation in material provided the Registrar.
- B. A specific right to unit owners and the condominium corporation to sue the developer for misrepresentation.

Recommendation No. 110:

The Condominium Act be amended:

- A. To provide a developer from entering into a binding agreement of purchase and sale or any agreement in which he is entitled to retain a prospective purchaser's deposit, until the Registrar's approval has been issued.
- B. To require the developer to notify purchasers that they have the right to terminate their agreements with the developer if the developer's documents do not receive approval.

Recommendation No. 111:

The Condominium Act be amended to provide that a developer who fails to comply with the Act be subject to a fine.

Recommendation No. 112:

The Condominium Act be amended to provide that a condominium corporation's failure to file information with the Registrar will make it subject to a penalty of up to a maximum of \$2,000.

Recommendation No. 113:

The Condominium Act be amended to provide that for the purpose of changing the provisions of an existing declaration to the standard provisions in the Act, a special vote of 70 per cent of the owners be allowed, and for the by-laws 50 per cent of the owners be allowed.

Recommendation No. 114:

The Condominium Act be amended to provide that the Registrar must approve these amendments to declarations and by-laws.

Recommendation No. 115:

A. The Condominium Act be amended to provide a system of dispute resolution structured as a two-tiered system composed of local Hearing Officers and a Tribunal.

B. The administrative responsibility for the system should rest with the Registrar of Condominiums.

C. The jurisdiction of the Hearing Officers and the Tribunal encompass the right to make decisions with respect to the collection of common expenses, the enforcement of the Act, declaration, by-laws and rules and regulations, damage to the common elements and the right to award costs.

D. Decisions of the Hearing Officers and the Tribunal be enforceable in the same manner as a decision of the courts.

Recommendation No. 116:

Before the legislation creating the Office of the Registrar comes into effect, an administrative office be established that will eventually become the Registrar's office.

Recommendation No. 117:

The Registrar's office be located in the Ministry of Consumer and Commercial Relations and that, in its establishment, the Ministry look to its other consumer protection bodies and the Ontario Securities Commission for guidelines and assistance.

Chapter 13 — Termination**Recommendation No. 118:**

The province request the federal government to clarify the situation with regard to the distribution of assets of an insolvent condominium corporation.

Recommendation No. 119:

The Condominium Act be amended:

A. To repeal the provisions in the Act for automatic termination of the condominium corporation in the event of a failure to vote for repair after substantial damage.

B. To require the condominium corporation to repair unless there is a vote by 80 per cent of the owners to terminate the condominium corporation.

Recommendation No. 120:

The Condominium Act be amended to provide that upon a vote to terminate:

A. The board of directors be liquidators of the condominium corporation.

B. The board as liquidators continue to be subject to the existing requirements for removal or election of directors.

C. The liquidators be empowered to cancel or renegotiate all existing contracts relating to the corporation or units, including leasing of units, paying all debts and entering into requisite arrangements with the municipality for the conversion of the property to a rental project or as necessary.

D. The liquidators be granted a power of attorney, on behalf of the unit owners and all persons with claims against units, to dispose of the unit owners' interests and to consent to substantial changes in the common assets of the corporation.

E. Notice of the liquidators' appointment be registered in the common elements index and property parcel register.

F. Other condominium corporations engaged in the use of joint recreation or other facilities, with the corporation being terminated where such facilities require a financial contribution from the condominium being terminated, be permitted to apply to the court for an order governing the disposal or other use of such facilities.

G. The condominium be terminated on registration of a notice that all creditors had been paid, obligations settled and all assets of the corporation had been disposed of.

Recommendation No. 121:

The Condominium Act be amended to provide that:

A. The liquidators appointed under the "winding-up" arrangements be empowered to apply to the court for an order permitting them to amend the declaration and by-laws so as to vary the number of units in the condominium and their appurtenant common interests.

B. The court may deem insurance money or money paid by the liquidators to unit owners as full satisfaction of any claims or rights of such unit owners.

Chapter 14 — Housing choice and government programs

Recommendation No. 122:

The AHOP program be amended:

A. So that subsidies are available from the time of occupancy.

B. To include common expense payments in the eligibility requirement calculation.

Recommendation No. 123:

The Condominium Act be amended to remove the section permitting condominiums on leased land.

Recommendation No. 124:

Federal and provincial programs such as AHOP-HOME, be directed towards encouraging alternate forms of housing, such as zero lot line or on-street townhousing, and that municipalities be more receptive to innovative housing forms.

Recommendation No. 125:

Municipalities endorse the "Urban Development Standards" report published by the Ministry of Housing to assist in the reduction of housing costs, thereby increasing the scope of housing choice.

Recommendation No. 126:

Legislation be amended to provide a legislative basis for all-adult buildings.

Glossary of terms

Board of directors

The directors of the condominium corporation are the elected representatives of the unit owners and assume the responsibility for the management of the condominium property and its business affairs.

By-laws

The documents which supplement many of the matters contained in the Declaration. They deal with the daily operational aspects of the condominium corporation and the duties and responsibilities of the board of directors.

Common elements

Those parts of the property that are shared and jointly owned by the unit owners (halls and passageways, swimming pool, etc.). Areas designated as common elements are outlined in detail in the declaration of the condominium corporation. No two declarations are necessarily the same. (See also **Exclusive use common elements**).

Common expenses

Expenses incurred by the condominium corporation in maintaining the common elements of the property and in carrying out the duties and responsibilities specified in the condominium documents and The Condominium Act.

Common interest

The proportionate interest in the common elements belonging to a unit.

Condominium

The term applied to a specific type of property ownership rather than to any distinct style of building. In condominium ownership the owner owns his own unit and shares ownership in the remainder of the property with the other unit owners.

Condominium corporation

A legal entity created on registration of the declaration and description in the appropriate land registry office of the Ministry of Consumer and Commercial Relations.

Declaration

The document which acts as the constitution of the condominium corporation. Its major significance is that it establishes the boundaries of units, common elements, and exclusive use common elements as well as each unit's proportionate ownership interest in the common elements and its percentage of contribution to the common expense payments. It also specifies voting majorities where The Condominium Act so provides.

Description

A detailed plan of the layout and location of the development, its units, common elements and exclusive use common elements. It includes a survey of the land, building outlines and structural plans. The description thus clearly shows those parts of the condominium development that are to be privately owned and those areas that are to be owned in common by the owners.

Developer

Term used to designate the initial owner of the project who invokes the Act by registering the appropriate documents.

Easements

A legal grant of rights to a person or persons which allows a person to pass over property not owned by that person.

Encumbrance

A burden or claim on property such as a mortgage or lien.

Estoppel certificate

A certificate which a condominium corporation is required to give upon the request of a purchaser of a condominium unit. Its purpose is to advise a new purchaser of any arrears in common expenses owing on the unit as well as an indication of any increased expenses which the condominium corporation may be anticipating.

Exclusive use common elements

Those common elements whose use is restricted to the owners of one or more units; conversely, those which are not available for use by all unit owners. (e.g. balconies, individual parking spaces, lockers, etc.)

Insurance trust agreement

An agreement whereby a trustee distributes the proceeds from an insurance policy, on behalf of the condominium corporation, the unit owners, and encumbrances.

Lien

A claim for the payment of money against a unit or a condominium corporation. The right to a lien can only be created by legislation. The enforcement of a lien is by way of sale of the property.

Management contract

The agreement entered into by the condominium corporation with a management company to employ that company for a fee to carry out the day to day responsibilities of maintaining the property, such as janitorial and landscaping services or effecting repairs. The contract may call for only one service or for several areas of service to be provided.

Offer to purchase

A term used to describe the document which sets forth all the terms and conditions under which a purchaser offers to purchase a unit. This offer, when accepted by the seller, becomes a binding agreement of purchase and sale.

Project documents

The term used in this text to refer to the documents other than The Condominium Act which govern condominium living, including the declaration, description, by-laws, rules and regulations.

Proxy

A document used to authorize an individual, other than the person entitled, to vote at meetings on that person's behalf.

Registration

Used in the condominium context to indicate the final step to invoke the Act by registering the declaration and description in the land registry office.

Rules and regulations

The rules respecting the use of common elements by which the owners, their families and guests are expected to abide.

Termination

An act the effect of which is that the condominium corporation ceases to be governed by The Condominium Act.

Unit

Term used to denote those parts of the project which are individually owned.

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R.L. Horton, Horton-Meade Condominium Management Ltd.
Kent Jenson, Wentworth C.C. #10
Ann Jones, Regional Chairman, Hamilton/Wentworth
Willard Jones
Barry Legg, Director & V.P., Wentworth C.C. #34
D.A. Lychak, Regional Municipality of Hamilton/Wentworth
Jack MacDonald, Mayor, City of Hamilton
Mrs. D. McCallion, Secretary/Treasurer, Wentworth C.C. #10
Charles Mattina, President, Wentworth C.C. #31
Paul Milne, Christilaw, Wigle & Milne
Keith Parkes, President, Wentworth C.C. #20
L. Siddiqui and Robt. Serena, Planning Dept., City of Burlington
H. Tredwell, V.P., Wentworth C.C. #9
M.B. Weleman & A.F. Ross, Fidelity Management Ltd.

Kingston February 4, 1977

Mr. Baker, Frontenac C.C. #1
Barbara Bartlett, President, Lennox C.C. #1
Lillian Christie, Rollicare Inc.
Don Deduke, Maurice H. Rollins Construction Ltd.
Stuart Fife, formerly Kingston Planning Board
Judith MacKenzie, Ald., Kingston Planning Board
Harold Poole, Frontenac C.C. #1
Barry Smith, V.P., Frontenac C.C. #2
Wayne Soules, Rollicare Inc. Property Management

Kitchener/Waterloo February 9, 1977

Board Member, Waterloo North C.C. #20
David G. Collins, Freure Homes Ltd.
R.G. Cornell, President, Wellington C.C. #12
Eric Cunningham, MPP, Wentworth North
A.J. DeGroot, Director & General Manager, Waterloo North C.C. #28
H. Epps, ex-Mayor, City of Waterloo
P.A. Falandysz, Secretary, Waterloo C.C. #16
S. Fanyeck, F. & W. Property Management Ltd.
Jim Gray, Chairman, Regional & Devel. Committee, City of Guelph
John Isaac
Wayne Marvel, Waterloo North C.C. #31
K.L. Perry, Director, Planning & Development, City of Guelph
Carol Powell, Chairperson, 121 University E.
Irene Price, Owner, 121 University E.
Mr. & Mrs. J.A. Smith, Owners, Guelph
Dirk C. de Snayer, President, Halton C.C. #33
T. Brock Stanley, President, Waterloo North C.C. #27
John J. Steeves, General Manager, Waterloo North C.C. #30
Bill Thomson, Regional Municipality of Waterloo
A.D. Ward, President, The Planistics Group

Toronto/Scarborough January 26, 1977

Wm. Alexander, Jr., Borough Clerk, Borough of East York
J. Anderson, Chairman-Planning & Devel., Regional Municipality of Durham
George Ashe, Mayor, Town of Pickering
D. Baxter, Planning & Development, City of Oshawa
Leslie Bodolai, Owner, York C.C. #75
Mr. S. Bogdanovic-Baron, Onway Consultants Ltd.
R.J. Bower, Planning, Municipality of Metropolitan Toronto
Harold Brake, President, Newcastle C.C. #1
Mike Breaugh, MPP, Oshawa
Frank Drea, MPP, Scarborough-Centre
John Fingret, Owner, York C.C. #47
Angela Flower, Letter from tenant - Vivian McMahon
Dr. Charles Godfrey, MPP, Durham West
Marylou Graham, Chairman, Planning Committee, Richmond Hill
Dr. J.J. Hajek, P. Eng.
Mr. R.A. James, York C.C. #219
Walter Kuipers, President, York C.C. #252
Joseph Lebovic, Urban Development Institute
Joseph Lobabai, York C.C. #76
Ivy Lovell, Owner, York C.C. #289
A.D. Mildon, Secretary/Treasurer, York C.C. #209
Dorothy Munn, Board Member, York C.C. #192
Christine Newman, 4101 Sheppard East, #1906, Agincourt

Kenneth G. Parker, President, York C.C. #279
Representative, Owner, York C.C. #113
Gwynne Robb, President, York C.C. #68
G.F. Roseblade, Deputy Clerk, Town of Whitby
Kenneth L. Saltzman, Solicitor
Andrew Simon, President, York C.C. #78
Ted Stella, V.P., Real Estate, Metropolitan Trust
John Spencer, York C.C. #98
John Taylor, York C.C. #57
H.S. Turton, Manager, Ontario C.C. #9
David Warner, MPP, Scarboro-Ellesmere
Hon. Tom Wells, MPP, Scarborough-North (with Larry Kent)
Wilma Westerhop, Board Member, York C.C. #75

Special Interest Groups February 17, 1977

Association of Municipalities of Ontario, Michael Smith, Alderman, Borough of North York
Canadian Bar Association
Canadian Cable Television Association
Condominium Association of Canada
Condominium Directors' Institute of Canada
Cosult Associates Ltd. (Brief also presented at Ottawa Hearing)
HUDAC - Ontario Council
Institute of Chartered Accountants of Ontario
Institute of Housing Management
Insurance Bureau of Canada
A.E. LePage Ltd.
Multi Family Council - HUDAC
Ontario Association of Architects
Ontario Condominium Association
Ontario Real Estate Association
Real Estate Institute of Ontario
Royal Bank of Canada
Toronto Real Estate Board
Trust Companies Association of Canada
Urban Development Institute

Table I
Number of Projects by Year Registered

YEAR OF REGISTRATION	LOW RISE		HIGH RISE	
	PROJECTS	PERCENTAGE	PROJECTS	PERCENTAGE
Up to and including 1970	3	5.17%	0	0.00%
1971	3	5.17%	2	3.45%
1972	3	5.17%	8	13.80%
1973	3	5.17%	1	1.72%
1974	5	8.62%	2	3.45%
1975	11	18.97%	6	10.35%
1976	7	12.07%	3	5.17%
1977	1	1.72%	0	0.00%
	Total Low Rise		Total High Rise	
	36	62.06%	22	37.94%

Table 2
Number of Projects by Size (Number of Units)

PROJECT RANGE	LOW RISE		HIGH RISE	
	PROJECTS	PERCENTAGE	PROJECTS	PERCENTAGE
0-50	7	12.07%	0	0.00%
51-100	14	24.14%	3	5.17%
101-150	10	17.24%	2	3.45%
151-200	1	1.72%	4	6.90%
201-250	2	3.45%	2	3.45%
251-300	1	1.72%	3	5.17%
301-350	0	0.00%	2	3.45%
351-400	0	0.00%	0	0.00%
400+	1	1.72%	6	10.35%
	Total Low Rise		Total High Rise	
	36	62.06%	22	37.96%



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